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An Introduction to the European Community's Legal Ethics Code

Part II: Applying the *CCBE Code of Conduct*

LAUREL S. TERRY*

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A lawyer practicing in the European Economic Community (EEC or EC), like lawyers everywhere, will inevitably be faced with the question: "What do the applicable ethics rules require of me?" As a first step in answering this question, a lawyer practicing in Europe must determine which ethics code is the applicable one.

One of the codes that might be applicable is, of course, the ethics code of the country in which the lawyer originally was admitted. An alternative ethics code that might be applicable is the ethics code of the country in which the lawyer is providing legal services. There is a third option, however, that may govern the actions of a lawyer practicing in Europe; a lawyer may be bound by the *CCBE Code of Conduct (CCBE Code)*.¹

At the moment, this third option would *not* apply to most American lawyers practicing in Europe, unless the American lawyers also were admitted to practice in a European country and were one of the types of European lawyers listed in the *CCBE Explanatory Memorandum*.² However, although the *CCBE Code* does not currently apply to most American lawyers practicing in Europe, American lawyers nevertheless may be interested in the question of when the *CCBE Code* applies. The Brussels Bar Association currently has been conducting discussions with an American Bar Association (ABA) Task Force about the conditions under which Americans could practice in Brussels.³ One condition that has been mentioned in these discussions is the American lawyer's agreement to be bound by the *CCBE Code*, subject to certain stated exceptions where compliance with the CCBE provision would be incompatible with the American lawyer's

1. CCBE CODE OF CONDUCT (1988) [hereinafter CCBE CODE]. See also EXPLANATORY MEMORANDUM AND COMMENTARY ON THE CCBE CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN COMMUNITY [hereinafter CCBE EXPLANATORY MEMORANDUM]. The *CCBE Code* and the *CCBE Explanatory Memorandum* were attached as Appendices and explained in the first part of this article. See generally Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 1-6, app. a at 60, app. b at 63 (1993) [hereinafter PART I].

2. CCBE EXPLANATORY MEMORANDUM, *supra* note 1, Rule 1.4 cmt.; see also PART I, *supra* note 1, at 10-11 nn. 32-36 & 19-20 nn. 67-69 and accompanying text.

3. The author is a member of the ABA Task Force and has been participating in these discussions. See also Update: *Brussels Bar Negotiation*, LAWS. EUR., Apr. 1993, at 9-10 (discussing Brussels bar's ideal agreement).

compliance with the relevant American provisions.⁴ In addition, one of the drafters of the *CCBE Code* expressed the desire for a single code of professional conduct that will apply to all cross-border activities of lawyers from countries that are signatories to the Uruguay Round of the GATT discussions, suggesting that the *CCBE Code* could serve as the basis for such a code.⁵ Thus, in the future, American lawyers might have a practical, as well as an academic, interest in the terms of the *CCBE Code*.

Part I of this two-part article, which was published in the prior issue of this journal, provided an introduction to the *CCBE Code*. Part I set forth information about the background and structure of the *CCBE Code*,⁶ compared the substantive provisions in the *CCBE Code* to the provisions in the *Model Rules of Professional Conduct (Model Rules)*,⁷ and offered an explanation for the differences between the substantive provisions of the *CCBE Code* and the *Model Rules*.⁸

Part II of the article continues the analysis of the *CCBE Code* by asking an additional question: "In which situations does the *CCBE Code* apply?" After introducing this question in Section I.A., Section I.B. suggests two alternative answers. Because one of the answers identified in Section I.B. requires reference to substantive EC law, Section I.C. of this article provides a brief overview of the substantive EC law relevant to the issue of which ethics codes a lawyer should use. Section II explores the question of how the *CCBE Code* will be implemented. Section II.A. addresses this issue by examining the disciplinary enforcement of the *CCBE Code*. Section II.B. focuses on judicial recognition of the *CCBE Code*. Section II.C. reviews one country's effort to implement the *CCBE Code*. Finally, Section III concludes Part II of this article with its hope that the *CCBE Code* will provide the first step toward a comprehensive code of ethical conduct for lawyers throughout the world.

I. IN WHICH SITUATIONS WILL THE *CCBE CODE* BE USED?

A. OVERVIEW

Whenever a lawyer analyzes the issue of what the applicable legal ethics rules require, that lawyer must explicitly or implicitly go through three

4. The author has first-hand knowledge of this suggestion because of her participation in the discussion.

5. See John Toulmin, *A Worldwide Common Code of Professional Ethics?*, 15 FORDHAM INT'L L.J. 673, 674-75 (1991-92).

6. PART I, *supra* note 1, at 2-16.

7. *Id.* at 17-45; MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

8. *Id.* at 45-59.

stages of analysis:

1) The first question one must ask is, in essence, a conflicts of law question: "Which law should one first consult in order to identify the applicable legal ethics rules?"⁹ One of the ways to approach this question is to look at a code, such as the *CCBE Code*, and ask the question: "In which situations does this code apply?" To state this principle broadly: *Somebody has to decide which law to use. Step 1 of the analysis tells you who that somebody is.*

2) The second step in the analysis builds on the answer to the question in Step 1. Using the source of law identified in Step 1, one must ask which set of ethics rules this source of law says should apply. (The initial source of law may say that another source of law should apply. For example, even for situations in which the *CCBE Code* applies, it quite often does not provide a substantive provision of its own but merely states that either Home or Host State¹⁰ ethics rules will apply, or occasionally both.) Thus, this second step, like the first, might be considered more of a "conflicts of law" analysis than a "legal ethics" analysis because it resolves the issue of whose ethics rules to use, rather than providing substantive content regulating a lawyer. To state this principle broadly: *Step 2 of the analysis tells you which ethics rules the "somebody" identified in Step 1 said you should use.*

3) It is only with the third step in the analysis that one can finally focus on the substantive content of the relevant legal ethics provisions and analyze what a lawyer may or may not do. To state this principle broadly: *Step 3 of the analysis tells you what the ethics rules say. (You analyze these particular ethics rules because the "somebody" identified in Step 1 told you in Step 2 which substantive provisions to use.)*

Part I of this article addressed the second and third steps of the analysis by discussing the substantive content of the *CCBE Code* as well as the situations where the *CCBE Code* operates as a conflicts of law code and requires application of "Host" or "Home State" law.¹¹ Part II of this article addresses the first question by asking in which situations the *CCBE Code* initially will apply. In other words, this section addresses the issue of when the *CCBE Code* is the "somebody" who either provides binding substantive provisions of its own or determines which law applies. Unfortunately,

9. The author's implicit assumption here is that there can be only one governing law; more precisely, the governing law may require a lawyer to comply with two different sets of law, but ultimately there must be a decision made as to the law which is supreme and which must be applied in order to resolve the conflicts of laws.

10. The *CCBE Code* defines the "Home Member State" as "the Member State of the Bar or Law Society to which the lawyer belongs." *CCBE CODE* Rule 1.6. It defines the "Host Member State" as "any other Member State where the lawyer carries on cross-border activities." *Id.*

11. See PART I, *supra* note 1, at 17-45.

however, the answer to this is somewhat complicated. This is because it is not clear whether the *CCBE Code* is intended to be read as a self-contained document which sets forth the situations to which it applies, or whether the *CCBE Code* itself requires a lawyer to consult the substantive EC law in order to answer the question of whether the *CCBE Code* applies to a particular situation.¹²

B. ADDRESSING QUESTION ONE: IN WHICH SITUATIONS DOES THE *CCBE CODE* APPLY?

1. The Easy Answer: *CCBE Rule 1.5* Says the *CCBE Code* Applies Whenever Cross-Border Activities Are Involved

The simple answer to the question “in which situations does the *CCBE Code* apply” is provided by the *CCBE Code* itself. Rule 1.5 of the *CCBE Code* makes the use of the *CCBE Code* mandatory by stating that “the following rules *shall* apply to the cross-border activities of the lawyer within the European Community.”¹³ Cross-border activities are defined as:

- (a) all professional contacts with lawyers of Member States other than his own; and
- (b) the professional activities of the lawyer in a Member State other than his own, whether or not the lawyer is physically present in that Member State.¹⁴

As Rule 1.5 explains, the *CCBE Code* is meant to apply to these cross-border activities “[w]ithout prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State”¹⁵

Although this definition of the situations to which the *CCBE Code* applies seems relatively straightforward, it can get complicated. The *CCBE Explanatory Memorandum* therefore provides examples of what would be considered “cross-border activities”:

The definition of cross-border activities would, for example, include contacts in State A even on a matter of law internal to State A between a lawyer of State A and a lawyer of State B; it would exclude contacts between lawyers of State A in State A on a matter arising in State B, provided that none of their professional activities takes place in State B; it

12. See also *id.* at 11-12 nn.37-41 and accompanying text.

13. *CCBE CODE* Rule 1.5 (emphasis added).

14. *Id.*

15. *Id.*

would include any activities of lawyers of State A in State B, even if only in the form of communications sent from State A to State B.¹⁶

Thus, on the one hand, the answer to the question of when the *CCBE Code* applies appears very straightforward and simple. Rule 1.5 seems to make the *CCBE Code* applicable to all cross-border activities, which are then defined. Unfortunately, however, the “cross-border activities” answer provided in *CCBE Rule 1.5* does not give the complete analysis necessary to answer the question of when the *CCBE Code* applies. One must also proceed to *CCBE Rule 2.4* and the complicated part of the answer.

2. The Complicated Answer: *CCBE Rule 2.4* Says a Lawyer Must Comply with Substantive EC Law, Which May Require Use of the Host or Home State Rules

If Rule 1.5 was the only provision of the *CCBE Code* that was relevant to the question of when the *CCBE Code* applies, this question would be relatively simple to answer. One could simply look at the definition of cross-border activities in *CCBE Rule 1.5* in order to know when the *CCBE Code* applied. However, since *CCBE Rule 2.4* is also relevant, the analysis is not so straightforward. Rule 2.4 may require a look at the substantive EC law governing lawyers before one can know when the *CCBE Code* applies.

Rule 2.4 adopted, almost verbatim, the first two sentences from Principle VIII in the CCBE’s *The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (Declaration of Perugia)*.¹⁷ Rule 2.4 states:

Under Community Law (in particular under the [Lawyers’ Services] Directive 77/249 of 22nd March 1977) a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the Host Member State. Lawyers have a duty to inform themselves as to

16. CCBE EXPLANATORY MEMORANDUM, *supra* note 1, Rule 1.5 cmt.

17. Compare CCBE CODE Rule 2.4 with THE DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY § VIII (1977) [hereinafter DECLARATION OF PERUGIA]. This declaration, which was a predecessor to the *CCBE Code*, contained eight “Principles,” most of which were later incorporated into the *CCBE Code*. The rather general principles contained in the *Declaration of Perugia* might be compared to the ABA’s 1908 *Canons of Professional Ethics (Canons)*. The *Declaration of Perugia* was

neither a full Code of Conduct, nor a binding set of rules, but a short discourse on the function of a lawyer in society, on the nature of the rules of professional conduct, and on some of the more important relevant principles of ethics such as integrity, confidentiality, independence, the corporate spirit of the profession and respect for the rules of other Bars and Law Societies.

CROSS BORDER PRACTICE COMPENDIUM ch. 4, at 10-12 (Dorothy Margaret Donald-Little ed., 1991) [hereinafter CCBE COMPENDIUM]. See also PART I, *supra* note 1, at 9-10 nn.27-31 and accompanying text.

the rules which will affect them in the performance of any particular activity.¹⁸

The *CCBE Explanatory Memorandum's* Commentary to Rule 2.4 offers a further explanation of the relationship between EC substantive law and the *CCBE Code*:

[T]he Lawyers' Services Directive . . . contains the provisions with regard to the rules to be observed by a lawyer from one Member State providing services . . . in another Member State as follows: [The comment then quotes that portion of the Directive which specifies which ethics rules should be used in certain situations.] In cases not covered by this Directive, the obligations of a lawyer under Community Law to observe ["Host State" Rules] are a matter of interpretation of the applicable provisions of the Treaty or any other relevant Directive. A major purpose of the Code is to minimize, and if possible eliminate altogether, the problems which may arise from 'double deontology,' that is the application of more than one set of potentially conflicting national rules to a particular situation (see Article 1.3.1).¹⁹

Thus, in order to understand when the *CCBE Code* applies, one must determine how Rules 1.5 and 2.4 should be read together. In other words, one must determine to what extent, if at all, Rule 2.4 modifies Rule 1.5.

There are at least two possible interpretations of Rule 2.4. Under the *first* interpretation, Rule 2.4 would be viewed as a modification or limitation of Rule 1.5. Therefore, according to the *CCBE Code* itself, one would have to consult the substantive EC law before one could be sure of when the *CCBE Code* applied. Under the *second* interpretation, Rule 2.4 would *not* be viewed as a modification of, or limitation on, Rule 1.5, and one would *not* have to consult the EC substantive law in order to determine when the *CCBE Code* applied. These two interpretations of Rule 2.4 are explored below.

a. Interpretation 1: *CCBE Rule 2.4* Withdraws Jurisdiction from *CCBE Rule 1.5*

According to the first interpretation, because Rule 2.4 contains two sentences, it should be read as containing two different obligations. One might conclude that the first sentence of Rule 2.4, which states that "[u]nder community law . . . a lawyer . . . may be bound to comply with the rules . . . of the Host Member State,"²⁰ imposes on the lawyer an obligation to use the relevant EC law. The second sentence, which states that "[l]aw-

18. CCBE CODE Rule 2.4.

19. CCBE EXPLANATORY MEMORANDUM, *supra* note 1, Rule 2.4 cmt.

20. CCBE CODE Rule 2.4.

yers have a duty to inform themselves as to the rules which will affect them . . . ,” could be viewed as an obligation to “learn the Host State ethics rules required by the relevant EC law.”²¹

Thus, under this first interpretation, which separates the two sentences of Rule 2.4 into two separate obligations, Rule 2.4 could be viewed as withdrawing some of the jurisdictional authority granted by Rule 1.5. Using this interpretation, Rule 1.5 provides the initial grant of jurisdiction when it requires those lawyers covered by the *CCBE Code*²² to use the *CCBE Code* whenever they are involved in cross-border activities. Rule 2.4 might be viewed as withdrawing some of this jurisdiction granted by Rule 1.5 because Rule 2.4’s first sentence could be viewed as changing the identity of the “somebody” who determines the governing legal ethics provisions. In other words, instead of the *CCBE Code* being the “somebody” who decides which ethics rules to use to regulate a particular cross-border activity, Rule 2.4 suggests that sometimes the “substantive EC law” is the “somebody” who decides which ethics rules apply to a particular cross-border activity. Thus, Rule 2.4 could be viewed as removing some of the jurisdiction granted to the *CCBE Code* in Rule 1.5 to regulate cross-border activities.

If this interpretation of Rule 2.4 is correct, a lawyer would not know the situations in which the *CCBE Code* establishes the applicable ethics provisions (i.e., situations in which the *CCBE Code* is the “somebody” who decides which ethics rules apply) without simultaneously knowing the EC substantive law on this point. Hence, under this interpretation of Rule 2.4, the *CCBE Code* is not a self-contained document. One cannot know when the *CCBE Code* applies merely by consulting the *CCBE Code* itself.

b. Interpretation 2: *CCBE Rule 1.5* Establishes the Jurisdictional Reach of the *CCBE Code*, and *CCBE Rule 2.4* Merely Sets Forth Additional Obligations

There is an alternative interpretation of Rule 2.4, however, which makes it simpler to determine when the *CCBE Code* applies. Under this interpretation, the *CCBE Code* is read as a self-contained document. Once again, Rule 1.5, which states that the *CCBE Code* applies to all cross-border activities, would be read as providing the jurisdictional grant for the *CCBE Code*. Under this second interpretation of Rule 2.4, however, Rule 2.4 should be read not as providing a limitation or withdrawal of Rule 1.5’s jurisdiction. Instead, the two sentences of Rule 2.4 would be viewed as providing an explanation and an additional obligation.

Under this alternative interpretation of Rule 2.4, one would read Rule 2.4’s two sentences together to mean the following: “Sometimes EC substan-

21. *Id.*

22. See *supra* note 2 and accompanying text.

tive law requires a lawyer to use the "Host State's" rules. In that situation, a lawyer has a duty to learn the "Host State's" rules." Under this alternative interpretation, Rule 2.4 is not viewed as modifying or limiting the jurisdiction granted in Rule 1.5. Instead, Rule 2.4 is read as imposing one additional substantive obligation, namely, the obligation to learn any applicable "Host State" rules. This new obligation, which would be viewed as the gist of Rule 2.4, is found in the second sentence of the rule which states that "[l]awyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity."²³

Under this alternative interpretation, one must of course address the meaning of Rule 2.4's first sentence:

Under Community Law (in particular under the [Lawyer's Services] Directive 77/249 of 22nd March 1977) a lawyer from another Member State may be bound to comply with the rules of the Bar or Law Society of the Host Member State.²⁴

Under this alternative interpretation of Rule 2.4, this first sentence does *not* itself require a lawyer to consult and apply the EC substantive law that mandates the "Host State's" ethics rules in order to determine the scope of the *CCBE Code*.²⁵ Instead, this first sentence of Rule 2.4 could be read merely as an accurate observation of the fact that there is a body of substantive EC law (developed both before and after the adoption of the *CCBE Code*) which states certain circumstances in which a "Host State's" ethics rules should apply.

This alternative interpretation of Rule 2.4 is most persuasive if one reads into Rule 2.4 an additional sentence. One might read the first sentence to contain both an accurate observation that an EC lawyer is required to obey substantive EC law, some of which states when the "Host State's" ethics rules should apply, as well as an implicit statement that this substantive EC law has been incorporated into the *CCBE Code*.²⁶

23. CCBE CODE Rule 2.4.

24. *Id.*

25. The lawyer, of course, has an independent obligation to follow substantive EC law. The issue is whether the *CCBE Code* itself requires a lawyer to look outside the code in order to determine when the *CCBE Code* applies or whether the *CCBE Code* itself attempts to codify that EC law so that the code can stand as a self-contained document. The *Model Rules* have used the latter approach, under which a lawyer who is subject to some law which supersedes the *Model Rules*, such as the United States Constitution, the *Model Rules* will then attempt to codify this law, so that it is readily available. Consequently, when changes or clarifications in the underlying law have occurred, the *Model Rules* have been amended. Compare MODEL RULES Rule 7.3 (1983) with MODEL RULES Rule 7.3 (as amended in 1989 to reflect the Supreme Court's decision in *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)); compare MODEL RULES Rule 7.4(c) (1983) with MODEL RULES Rule 7.4(c) (as amended 1992 to reflect the Supreme Court's decision in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990)).

26. One may test the accuracy of the assumption that substantive EC law has been incorporated

If the *CCBE Code* was indeed intended to incorporate the existing substantive EC law, then this alternative interpretation of Rule 2.4 makes sense. Stated slightly differently, if the *CCBE Code* itself already incorporates EC law, then it is not necessary for Rule 2.4 to require a lawyer to look outside the *CCBE Code* to any EC substantive law.

Moreover, under this alternative definition, the first sentence of Rule 2.4 thus would be viewed not as a withdrawal of the jurisdiction granted by Rule 1.5 but rather as a recognition of the fact that the *CCBE Code* was adopted against the background of this other body of law. Thus, this first sentence of Rule 2.4 would be viewed as acknowledging that the *CCBE Code* is intended to be consistent with, and reflect, this body of substantive EC law. If there were a conflict between the *CCBE Code* (which was voluntarily adopted by Member States) and the substantive EC law, the substantive EC law would have supremacy.²⁷

Therefore, under this alternative interpretation, this first sentence of Rule 2.4 could also be read as acknowledging the supremacy of EC law and expressing the view that if there is a conflict between a *CCBE Code* provision and a European Court of Justice Ruling,²⁸ an EC Council Directive,²⁹ or other substantive EC law, then the *CCBE Code* should be revised in order to conform to that substantive EC law.³⁰

The advantage of this interpretation of Rule 2.4 is that it permits the *CCBE Code* to be read as a self-contained document. One can answer the question of when the *CCBE Code* applies simply by consulting Rule 1.5 of the *CCBE Code*. Under this interpretation, Rule 2.4 is read as imposing an obligation completely unrelated to the jurisdictional provisions of Rule 1.5.

This alternative interpretation of Rule 2.4 is preferable for several reasons. While recognizing that this interpretation is not expressly set forth in the language of Rule 2.4, it is far more sensible to have only one document which a lawyer must consult in order to learn when the *CCBE Code* applies. Moreover, it is sensible to assume that the drafters of the *CCBE Code* intended such a result and meant to incorporate into the *CCBE Code* the substantive EC law which is binding.³¹ If this assumption is correct and the EC substantive law already has been incorporated into the *CCBE Code*, then there is no need for Rule 2.4 to withdraw jurisdiction from Rule

into the *CCBE Code* by comparing the provisions of the *CCBE Code* which were set out in Part I of this article with the substantive EC law explained in Section I.C. See *infra* Section I.C.

27. See *CCBE CODE* Rule 1.3 (recognizing that the *CCBE Code* itself is not enforceable).

28. See generally GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 69-72, 96-195 (1993) (discussing the European Court of Justice and judicial review in general).

29. *Id.* at 74-75.

30. See *supra* note 26.

31. This approach would be similar to the approach adopted by the ABA in its *Model Rules*. See *supra* note 26. This common-sense conclusion will be discussed in detail in Section I.C.

1.5 and require reference to the EC substantive law. Moreover, the fact that the language of Rule 2.4 was drawn from the earlier *Declaration of Perugia*³² makes it more likely that this rule was viewed as innocuous and that it was not a deliberate attempt to withdraw jurisdiction. Finally, while the *CCBE Code* has not removed all problems resulting from a lawyer being subject to multiple and perhaps even conflicting sets of laws (or “double deontology” in the language of the *CCBE Code*),³³ it should be interpreted as an effort to remove the “conflicts of law” double deontology problems by establishing clearly the “somebody” who determines whose ethics laws apply.

In sum, if this alternative interpretation is used, then the main thrust of Rule 2.4 lies solely in the second sentence which requires a lawyer to learn “Host State” rules where necessary.³⁴ According to this alternative interpretation, the first sentence of Rule 2.4 is merely a recognition that the *CCBE Code* was adopted against a background of substantive EC law which the *CCBE Code* has tried to incorporate into its provisions.

At this point, frustrated with the question of when the *CCBE Code* applies, one might wonder why the *CCBE Code of Conduct* ever exists. Since there is a body of substantive EC law which tells a lawyer when to use “Host State” rules, cannot this substantive EC law function as the “somebody” who tells lawyers which law to use or, even better, provide substantive provisions telling lawyers involved in cross-border activities what to do?

Although EC substantive law theoretically could function as the “somebody” who tells lawyers which law to follow or who provides a harmonized law which all lawyers in the EC could use, it has not yet done so. As will be explained in Section I.C., the substantive EC law regarding lawyers is fundamentally incomplete; it has not yet addressed all the situations in which a lawyer may be involved in cross-border activities. Because the substantive EC law is incomplete, some other form of regulation was needed. As explained by the Commentary to Rule 2.4, the *CCBE Code* was viewed as an effort to avoid the “double deontology” problems which result from such a vacuum.³⁵ The *CCBE Code* is thus necessary in order to fill any existing gaps in the EC substantive law and thereby consolidate and clarify that law.

In sum, the answer to the question of when the *CCBE Code* applies is not clear. The simple answer is that use of the *CCBE Code* is initially required whenever there are the cross-border activities specified in Rule 1.5.³⁶ It is

32. DECLARATION OF PERUGIA, *supra* note 17, § VIII.

33. CCBE CODE Rule 1.3.1. (“A particular purpose of the statement of those [common] rules is to mitigate the difficulties which result from the application of ‘double deontology’ as set out in Article 4 of the E.C. Directive 77/249 of 22nd March 1977.”)

34. CCBE CODE Rule 2.4.

35. CCBE EXPLANATORY MEMORANDUM, *supra* note 1, Rule 2.4 cmt.

36. One must remember, however, in accord with Step 2 of the analysis, even when the *CCBE*

possible, however, that some of the jurisdiction granted by Rule 1.5 was withdrawn by Rule 2.4. If this latter interpretation is correct, then the *CCBE Code* is not a self-contained document and one cannot answer the question of when the *CCBE Code* applies merely by looking at the *CCBE Code* itself. Instead, one would also have to consult EC substantive law in order to determine what jurisdiction had been removed by Rule 2.4. Ultimately, we probably will not know which interpretation is correct until a problem occurs and a ruling from the European Court of Justice is issued.

C. THE BACKGROUND: A REVIEW OF THE EC SUBSTANTIVE LAW RELEVANT TO THE ISSUE OF WHICH ETHICS RULES APPLY

As set forth above, depending on one's interpretation of Rule 2.4 of the *CCBE Code*, either:

- 1) the *CCBE Code* was adopted against the background of EC substantive law regarding the proper ethics rules to be used and is intended to incorporate this law; or
- 2) EC substantive law serves as a basis for taking away some of the jurisdictional authority granted in Rule 1.5.

Whichever interpretation of Rule 2.4 is correct, it is clear that in analyzing the *CCBE Code*, one should be at least somewhat familiar with the EC substantive law that regulates lawyers and establishes the relevant source of legal ethics. This section thus provides a brief foray into the substantive EC law related to legal ethics.³⁷

1. Introducing the Difference Between an EC Lawyer's "Right to Establish" and the "Right to Provide Services"

The starting point for an analysis of how substantive EC law affects

Code is the "somebody" who decides which law applies, the *CCBE Code* may not itself have any substantive provisions which apply but may instead merely direct the use of either "Home" or "Host State" rules.

37. See PART I, *supra* note 1, at 3-5 n.4 for a listing of sources addressing this topic. An excellent introduction to European Community law and its effect on lawyers is provided by Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556 (1991-92). Other sources cited throughout Part II include: HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS* (1992); Karl Hempel, *Die Niederlassungsfreiheit in den Europäischen Gemeinschaften und die österreichische Anwaltschaft*, 1988 ÖSTERREICHISCHES ANWALTS-BLATT 487 [hereinafter this journal will be abbreviated as ANW.BL., and this article as Hempel I]; Julian Lonbay, *Diplomas Directive: Recognising Legal Qualifications in the EC*, LAWS. EUR., Jan.-Feb. 1991, at 10 [hereinafter Lonbay I] (part one of a two-part article); Julian Lonbay, *Diplomas Directive: Recognising Legal Qualifications in the EC*, LAWS. EUR., Mar.-Apr. 1991, at 5 [hereinafter Lonbay II] (part two of a two-part article); Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 INT'L LAW. 899 (1992).

lawyers should be a recognition that one of the four principal "freedoms" provided by the treaty which created the EC was the freedom of movement of persons.³⁸ In connection with this freedom of movement of persons, one must distinguish between the "right of establishment" and the "right to provide services." This distinction is described in the *EEC Treaty* itself.³⁹

38. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC Treaty] art. 3(c) *Treaties Establishing the European Communities* Abridged Edition 1979 (Comm'n of the European Communities ed., 1979) ("The activities of the Community shall include . . . the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital."). In addition to freedom of movement for persons, services, and capital, Article 3 provides for freedom of movement of goods. *Id.* See also PART I, *supra* note 1, at 11 n.37 and accompanying text.

Although there originally was some question about whether the freedom of movement represented by the freedom of establishment and freedom to provide services would apply to the professional activities of a lawyer because of the exception for the exercise of official authority, this issue was resolved by the European Court of Justice in favor of freedom for lawyers. See, e.g., Rainer Hofmann, 1992 and the *Freedom of Establishment of Lawyers*, INT'L LEGAL PRAC., Mar. 1990, at 7-8; see also, e.g., Goebel, *supra* note 35, at 587-88; Siskind, *supra* note 35, at 911-12.

39. In providing for the cross-border movement of persons, the *EEC Treaty* distinguishes between the "right of establishment" and the "right to provide services."

The right to establishment is granted in Article 52 of the *EEC Treaty*. The article provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

EEC TREATY, *supra* note 38, art. 52. See also *id.* art. 53-58.

Some of the principle articles governing the right to provide services are found in Articles 59 and 60. Article 59 provides:

Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are provided.

Id. art. 59.

Article 60 provides:

Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment,

The "right of establishment" allows lawyers to set up their own firms in a country other than their "Home State."⁴⁰ The "right to provide services" permits lawyers to provide legal services in a foreign country on a more temporary or sporadic basis.⁴¹ Lawyers practicing in a country other than their "Home State" will be treated differently depending on which of these rights they are exercising. Therefore, when one is analyzing how EC substantive law governs a lawyer's professional behavior, one must always begin by asking whether the lawyer is becoming "established" in the "Host Member State" or is merely "providing services."

In the extreme cases, it is of course easy to visualize the difference between a lawyer seeking to become permanently established in a "Host Member State" and a lawyer who only wants to be able to provide services in a "Host Member State" on a temporary or sporadic basis. The difference, however, may become one of degree, not of kind.⁴² There will be borderline cases where a lawyer has not permanently relocated to the "Host State" but anticipates going there often enough that it may not be accurate to say the lawyer's provision of services is only "temporary" or "sporadic."⁴³

Although one must remember to distinguish between a lawyer's "right of establishment" and the "right to provide services," the fundamental principle underlying both these rights is the same: equality. According to the *EEC Treaty*, both the "right of establishment" and the "right to provide services" in a Member State must be available to all citizens of the EC on a

the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Id. art. 60. See also *id.* art. 61-66.

40. *Id.* art. 2.

41. *Id.* art. 60.

42. See JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 167 (1988); Goebel, *supra* note 37, at 607-609 nn.125 & 129 and accompanying text.

43. See Hempel I, *supra* note 37, at 494. Dr. Hempel provides a good illustration of this point. If a German lawyer, whose established base is a Munich office, wants to work three times a week out of a Salzburg, Austria, vacation house, which is not the lawyer's established base, is this lawyer significantly different from a lawyer who becomes established in Austria, but is only in Salzburg periodically? *Id.* (Although it can be a subtle distinction as to whether someone is established or merely providing services in another member state, this distinction is important because different *EEC Treaty* provisions govern establishment and the provision of services. See *supra* note 39.)

One of the Information Officers of the CCBE has remarked:

Commentators also tend to assume that the Directive only enables the visiting lawyer to provide "occasional" services, with the implication that a certain degree of frequency or regularity would take the services outside its scope. This is an area of some doubt on which there is a lack of authority. An attempt by one Member State (Spain) in its transposing legislation to impose an arbitrary limit of five times a year on the frequency with which services could be provided under the Directive met with objections from the EC Commission and was withdrawn.

ADAMSON, *supra* note 37, at 34.

non-discriminatory basis.⁴⁴ A Member State may not discriminate in favor of its own citizens and against citizens from other Member States.⁴⁵ Thus, this principle of nondiscrimination is the standard against which all legislation is measured.

2. Identifying the Different Situations in Which a Lawyer Might Wish to Provide Legal Work in a Host State

In order to understand the substantive EC law which regulates the activities of lawyers and which specifies the applicable ethical rules, one must be familiar with the four possible situations that might arise depending on the types of practice that a lawyer from an EC Member State might pursue.

The first situation involves a lawyer who wishes to confine the practice of law entirely to the country in which the lawyer was originally admitted (i.e., the "Home State"). A lawyer pursuing this type of practice would have no contact with lawyers from other countries and would not handle any matters involving other countries.

The second situation involves a lawyer who wishes to "provide services" on a temporary or sporadic basis in a "Host State," without becoming licensed in the "Host State." An example of this scenario is a lawyer ("*Rechtsanwalt*") licensed in Germany, who may want to travel to France occasionally to handle a matter for a client. The German lawyer ("*Rechtsanwalt*") wants to be able to do this on a sporadic or temporary basis, without being licensed in France. The German "*Rechtsanwalt*" has no intention of holding himself out as an "*Avocat*" (the title of a lawyer licensed in France).

The third situation would arise if a lawyer wished to work permanently and become "established" in another country or "Host State," so that the lawyer is licensed in the "Host State" and would be permitted to use the title of "Host State lawyer," in addition to the title used in the original or "Home State." An example of this situation is a lawyer ("*Rechtsanwalt*") originally licensed in Germany who now wants to move to Paris and practice

44. Both the "right of establishment" and the "right to provide services" are subject to Article 7 which provides that "[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." EEC TREATY, *supra* note 38, art. 7. The fundamental principle of the "right to establishment" and the "right to provide services" is that of nondiscrimination. Subject to the exceptions listed above, the equality of opportunity can be exercised "under the conditions laid down for its own nationals by the law of the country where such establishment is effected," or "under the same conditions as are imposed by that State on its own nationals." EEC TREATY, *supra* note 38, arts. 52, 60 (Rights of Establishment and Services).

45. The American experience shows, however, that it is not always easy to tell when provisions are discriminatory, especially when they are facially neutral but have a discriminatory effect when applied to a citizen from another Member State. As an example of the way in which facially neutral regulations may be viewed as discriminatory, see *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the classic American law school "Commerce Clause" case.

in Paris. The German “*Rechtsanwalt*” wants to become “established” in France and become a full-fledged, licensed French attorney, so that the lawyer can use both the German title “*Rechtsanwalt*” and the French title “*Avocat*.”⁴⁶

The fourth situation involves some combination of the second and third. In this scenario, a lawyer licensed by an EC Member State wishes to become “established” in a “Host State” (in the sense that the lawyer practices in the Host State on more than a temporary or sporadic basis), but the lawyer does not want to become fully established in that “Host State” nor use the title of “Host State Lawyer.” This might occur, for example, when a lawyer (“*Rechtsanwalt*”) originally licensed in Germany wants to become “established” or set up shop in France. The German “*Rechtsanwalt*” does not, however, intend to use the French title of “*Avocat*.” For example, a German lawyer in Stuttgart might have a summer home in Alsace, near Strasbourg, France. This German lawyer may want to be able to practice law a few days a week during the summer, as a German “*Rechtsanwalt*,” from a branch office in Strasbourg, near the lawyer’s summer home.

A lawyer will receive different treatment under EC law depending on which of these four types of practices the lawyer wishes to pursue at any given time in any given country.⁴⁷ The sections that follow give a brief summary of the substantive EC law that will govern each of these four situations.⁴⁸ As this discussion demonstrates, it is not always absolutely clear under EC substantive law which ethics rules a lawyer is to follow. Therefore, this review of the substantive EC law related to a lawyer’s ethics indirectly demonstrates the function served by the *CCBE Code* — namely, to help clarify these issues.

3. The EC Substantive Law Applicable in Different Situations

a. Situation 1: A Lawyer Engaging in Purely Domestic Activities

In the first situation, in which a lawyer is engaged in purely domestic legal

46. For a list of additional situations in which a lawyer might want to be registered, see EXPERTS DRAFT DIRECTIVE ON RIGHTS OF ESTABLISHMENT: EXPLANATORY MEMORANDUM, June 1990, reprinted in ADAMSON, *supra* note 37, app. 4 at xxxix [hereinafter EXPLANATORY MEMORANDUM TO DRAFT DIRECTIVE ON ESTABLISHMENT]. Over the years, there had been debate as to whether EC substantive law recognized any right of establishment for such registered lawyers (lawyers who want to establish under home title without integration into the “Host State” legal profession). See authorities cited *infra* note 80.

47. Note that these four types of practice are not mutually exclusive. A lawyer may pursue several of these types of practices in different countries at the same time. A lawyer might, for instance, be “established” in one “Host State,” be “registered” in another “Host State,” and “provide services” in yet another “Host State.” For the purposes of this discussion, however, we will address each type of practice in isolation from other activities that the lawyer might be pursuing in other countries.

48. A complete analysis of the substantive EC law regarding the free movement of lawyers is both beyond the scope of this article and is explained in detail in numerous articles focusing on this issue. See PART I, *supra* note 1, at 3 n.4.

work, EC substantive law does not state which legal ethics rules to apply. The *CCBE Code* similarly excludes such a lawyer from its coverage since, by definition, the lawyer pursuing this type of practice is not engaged in cross-border activities. In this situation, the lawyer's activities would be regulated by the code of conduct of the lawyer's country rather than by the *CCBE Code* or EC substantive law.⁴⁹

b. Situation 2: A Lawyer Providing Services in a Host State

Unlike the first situation, there is substantive EC law concerning the applicable ethics rules that apply in the second situation, when a lawyer wishes to provide services in another EC Member State on a temporary or sporadic basis. According to the *Council Directive of 22 March 1977 (Lawyers' Services Directive)* (which is EC law addressing the issue of a lawyer's freedom to provide services),⁵⁰ the ethics rules a lawyer should use depends on the nature of the services the lawyer provides in the "Host State."⁵¹ This directive distinguishes between lawyers who are providing litigation ser-

49. See CCBE CODE Rule 1.5; CCBE EXPLANATORY MEMORANDUM, *supra* note 1, Rule 1.5 cmt. As a practical matter, however, the legal ethics provisions in the lawyer's country may ultimately evolve so that they are consistent with the provisions in the *CCBE Code*. If, as noted in the "Purpose" section of the *CCBE Code*, its rules will "be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation," the day may come where the CCBE rules and domestic rules are closely aligned. CCBE CODE Rule 1.3.

50. COUNCIL DIRECTIVE OF 22 MARCH 1977 (77/249/EEC) [hereinafter *LAWYERS' SERVICES DIRECTIVE*] (to facilitate the effective exercise by lawyers of freedom to provide services), *reprinted in* CCBE COMPENDIUM, *supra* note 17, ch. 5, at 38-43. For a discussion of this directive and the background leading up to its adoption, see ADAMSON, *supra* note 37, at 33-42; Goebel, *supra* note 37, at 576-85.

By way of background for those unfamiliar with EC law, a "Directive" is binding law. It is part of the "secondary legislation" of the EC, in contrast to the initiating and subsequent treaties, which are the "primary law." See CCBE COMPENDIUM, *supra* note 17, ch. 2, at 13-18. A "Directive" requires express incorporation into domestic legislation. Although the manner of incorporation is left to the Member States, Article 189 of the *EEC Treaty* does not permit a Member State to avoid giving effect or to give only partial effect to a Directive. See *EEC TREATY*, *supra* note 37, art. 189.

The other binding secondary legislation in the EC consists of "Regulations" and "Decisions." Regulations are "general rules which are binding in all Member States without further formality They give immediate rise to rights and obligations enforceable by individual citizens before their national courts." CCBE COMPENDIUM, *supra* note 17, ch. 2, at 15. Decisions are addressed to either Member States or individual citizens. They are binding upon those to whom they are addressed. *Id.* ch. 2, at 16-18.

51. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 4. Article 1(2) of the directive defines which professionals in each country are intended to be included within the term "lawyer." This listing is the same as that later seen in Rule 1.4 of the *CCBE Code*. CCBE CODE Rule 1.4. See also PART I, *supra* note 1, at 10 n.33 and accompanying text.

vices⁵² and lawyers who are providing other services.⁵³ For lawyers engaged in litigation, Article 4(2) states that the lawyer should follow the "Host State's" ethics rules.⁵⁴

Although the first part of Article 4(2) of this directive requires litigating lawyers to use the "Host State's" ethics rules, the second half of this article makes the issue much less clear. After stating that litigating lawyers should use the "Host State's" ethics rules, Article 4(2) continues by stating that this should be done "without prejudice to his obligations in the ["Home State"] from which he comes."⁵⁵ No explanation of this qualifying phrase is given; nor is the lawyer told exactly how to resolve any conflict that may exist between the "Home" and "Host State" rules.⁵⁶

52. See *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, arts. 4(1), (2). These provisions state:

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.
2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State without prejudice to his obligations in the Member State from which he comes.

Id. art. 4(1), (2).

53. *Id.* art. 4(4). Article 4(4) does not spell out or limit the nature of the non-litigation services lawyers may engage in. The only limitation on services is found in Article 1(1). This article states that nothing in it shall prohibit Member States from reserving to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons and the drafting of formal documents creating or transferring interests in land. *Id.* art. 1. Article 1 thus implicitly acknowledges the fact that in some Member States, these tasks are reserved to a "notary," rather than the specified category of lawyer covered by the *Lawyers' Services Directive*. For a discussion of the different types of notaries and their work, see PART I, *supra* note 1, at 10-11 nn.32-36 and accompanying text; Goebel, *supra* note 37, at 577; Siskind, *supra* note 37, at 905.

54. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 4(2).

55. *Id.*

56. The *Lawyers' Services Directive* appears to see no difficulty in having a lawyer subject to multiple sets of ethics rules. *But cf.* Case 107/83, *Ordre des Avocats du Barreau de Paris v. Klopp*, 1984 E.C.R. 2971, 1 C.M.L.R. 99 (1985). In the *Klopp* case, France argued that in order to ensure compliance with the professional rules of conduct, the Paris bar should be permitted to require that an avocat practice exclusively in Paris, and not also practice from his Dusseldorf, Germany office. *Klopp*, 1984 E.C.R. at 2973-74, 2976-78, 1 C.M.L.R. at 99-102. The Commission, Denmark, the Netherlands, and the United Kingdom indicated that both sets of ethics rules should apply but did not indicate how any conflicts should be resolved. *Klopp*, 1984 E.C.R. at 2978-85, 1 C.M.L.R. at 103-104. The European Court of Justice found the Paris bar's concerns legitimate but found that the existence of a second office did not prevent the Paris bar from enforcing its rules of professional conduct. *Klopp*, 1984 E.C.R. at 2990, 1 C.M.L.R. at 114. The court did not clearly resolve the issue of whose rules would apply if there were a conflict. *Klopp*, 1984 E.C.R. at 2985-91, 1 C.M.L.R. at 110-15. See also Goebel, *supra* note 37, at 590-91 (discussing *Klopp*).

The *Lawyers' Services Directive* further appears to assume either that there will be no conflict between these two sets of rules or that no further guidance is needed as to which rules a lawyer should use. In fact, however, several possible conflicts between "Home" and "Host State" ethics rules have been identified by various commentators. The possible conflicts between Home and Host State rules occur with respect to the rules on publicity, fees, conflicts of interest, employment of

Article 4(4) uses almost the mirror image of this approach with respect to the issue of which ethics rules non-litigating lawyers should use. This provision initially states that non-litigating lawyers are governed by the "Home State's" ethics rules.⁵⁷ The article continues, however, by requiring that this be done "without prejudice to respect for the rules . . . [of] the Host State."⁵⁸ Article 4(4) lists five types of ethics rules which the non-litigating lawyer must take special care to respect:

A lawyer pursuing activities other than . . . [litigation] shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the Host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State,

lawyers, and insurance. *See, e.g.,* D.A.O. Edward, *European Community Directive: The Provision of Services by Lawyers*, 22 J.L. SOC'Y SCOT. 191-92 (1977); Goebel, *supra* note 37, at 579; Lonbay II, *supra* note 37, at 10. *See also* SERGE-PIERRE LAGUETTE, *LAWYERS IN THE EUROPEAN COMMUNITY* 246-58, 266-67 (1987); LINDA S. SPEDDING, *TRANSNATIONAL LEGAL PRACTICE IN THE EEC AND THE UNITED STATES* 187-90 (1987).

Furthermore, it is not at all clear that the phrase "without prejudice to" clearly advises a lawyer how to resolve these conflicts. One commentator has described the term "without prejudice to" as meaning "in addition to" so that if a conflict exists, the stricter rules will apply. *See* Siskind, *supra* note 37, at 916. However, even if one were always able to determine which is the stricter rule, this interpretation is not the only possible one. *See* Goebel, *supra* note 37, at 628-29 (discussing how different interpretations would affect application of several specific rules from the *CCBE Code*). Specific examples of difficulties that can occur in an American context in which a lawyer was subject to two competing sets of rules are ably set forth in the report of the Comm. on Counsel Responsibility, *Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States*, 45 BUS. LAW. 1229 (1990).

The only specific guidance in the *Lawyers' Services Directive*, as opposed to the general strictures of Article 4, which is provided to a lawyer in order to help the lawyer identify the specific ethics rules to follow, is the guidance found in Articles 5 and 6. Article 6 indicates that a state *may* exclude lawyers who are salaried from pursuing activities relating to representation of that undertaking in legal proceedings if lawyers established in the state are similarly prohibited. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 6. *See also* Siskind, *supra* note 37, at 916-917. Article 5 indicates that a Member State may require the visiting lawyer to be introduced to the presiding judge or bar president in accordance with local rules or custom, or to work in conjunction with a local lawyer who practices before the judicial authority in question. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 5. *But see* Case 427/85, *Commission v. Federal Republic of Germany*, 1988 E.C.R. 1123, 2 C.M.L.R. 677 (1989) (holding that German legislation implementing Article 5 was too restrictive in six areas); Judgement of the Court of 10 July 1991 in Case C-294/89: *Commission of the European Communities v. French Republic (Lawyers-Freedom to Provide Services)*, 1991 O.J. (C 203) 11 (finding that French legislation implementing Article 5 was too restrictive in three areas).

In one case, the European Court of Justice cited Article 4 in support of its conclusion that a lawyer providing services in a legal proceeding in a "Host State" (i.e., a litigating lawyer) must comply with "Host State's" ethics rules concerning "dignity, good repute and integrity," not just the ethics rules related to the legal proceeding itself. Case 292/86, *Gullung v. Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne*, 1988 E.C.R. 111, 113, 136-38, 2 C.M.L.R. 57, 70-73 (1988). For a critique of the reasoning used in this case, *see* Goebel, *supra* note 37, at 583-84.

57. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 4(4).

58. *Id.*

professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity.⁵⁹

The requirement that a non-litigating lawyer use the "Home State's" rules without prejudice to respect for the "Host State's" rules, like the requirements for litigating lawyers, does not tell a lawyer how to resolve any conflict that may exist between the "Host" and "Home State" rules.⁶⁰ The only guidance a lawyer receives comes in the form of two additional directives. First, the lawyer is told to use the "Host State's" rules only if they are capable of being observed by a lawyer who is not established.⁶¹ (Thus, a residency requirement would not be permitted). Second, the lawyer is told that the "Host State's" rules must be respected only to the extent to which their observance is *objectively justified* to ensure the proper exercise of a lawyer's activities, the standing of the profession, and respect for the rules concerning incompatibility of professions.⁶²

59. *Id.* Despite Article 4(4)'s statement that non-litigating lawyers should pay particular attention to the "Host State's" rules regarding incompatibility of occupations, it should be noted that the specific provisions in Article 6 regarding salaried lawyers do not appear to apply to nonlitigating lawyers. *Id.* art. 6. See *supra* note 56. As one commentator noted, this may be because "activities such as an in-house lawyer accompanying a client abroad to advise the client in the negotiation of a contract had occurred without objection prior to the issuance of the Services Directive." Siskind, *supra* note 37, at 917.

60. See *supra* note 56. The *Lawyers' Services Directive* does not, for example, attempt to provide the guidance that appears in the amendment to *Model Rule 8.5* which the ABA recently adopted. The ABA added a conflicts-type provision to indicate which provision should control when an American lawyer is licensed by multiple jurisdictions and subject to conflicting rules:

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

ABA Committee Seeks Change to Model Rule of Jurisdiction, [9 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 173 (1992) (reprinting the text of revised *Model Rule 8.5*); *ABA Adopts Several New Rules, Approves Certification Groups*, *id.* at 236 (1993) (reporting on the adoption of revised *Model Rule 8.5* at the August 1993 Annual Meeting.)

61. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 4(4).

62. *Id.* To date, there have been no cases establishing what this phrase means for the non-litigating lawyer. *But see* Judgement of the Court of 10 July 1991 in Case C-294/89: Commission of

In contrast to the rather general guidelines used in this EC Directive, the *CCBE Code* has attempted to provide some specific ethics rules with substantive content which a lawyer could follow. Thus, for example, whereas Article 4(4) of the *Lawyers' Services Directive* simply tells a lawyer that he remains subject to the "Host State" rules regarding "relations with other lawyers," the *CCBE Code* has attempted to spell out in Rule 5 what these obligations mean.⁶³ More importantly, whereas article 4(4) of the *Lawyers' Services Directive* requires a lawyer to follow "Host" and "Home State" rules regarding conflicts and confidentiality without resolving the issue of what to do when these provisions conflict, the *CCBE Code* has provided substantive rules on these topics for a lawyer to follow.⁶⁴

The *CCBE Code* also resolves some conflicts among Member State rules by establishing substantive provisions concerning segregation of client funds and professional indemnity insurance.⁶⁵ The *CCBE Code* does not, however, resolve entirely the issue of how a lawyer is to comply with both "Host" and "Home State" rules on certain topics. For example, with respect to the topic of publicity, the *CCBE Code* provides scarcely more guidance than the *Lawyers' Services Directive*. On the one hand, the *CCBE Code* requires lawyers to use the "Host State's" publicity rules, but it also states that "the lawyer will remain bound to observe the rules of the Bar or Law Society to which he belongs to the extent that they are consistent with the rules in this code."⁶⁶ With respect to incompatible professions, the *CCBE Code* provides some additional specific guidance, but it does not resolve all issues.⁶⁷ Still,

the European Communities v. French Republic (*Lawyers-Freedom to Provide Services*), 1991 O.J. (C 203) 11 (striking down as too restrictive the country's implementing legislation concerning the migrant litigating lawyer's obligation to act in conjunction with a "Host State" lawyer.); Case 427/85, *Commission v. Federal Republic of Germany*, 1988 E.C.R. 1123, 2 C.M.L.R. 677 (1989). See also *infra* note 71 (citing Professor Goebel's discussion of what these phrases might mean when applied to ethics provisions.)

63. See CCBE CODE Rule 5.1 (Corporate Spirit of the Profession); CCBE CODE Rule 5.2 (Co-operation among Lawyers of Different Member States); CCBE CODE Rule 5.3 (Correspondence Between Lawyers); CCBE CODE Rule 5.4 (Referral Fees); CCBE CODE Rule 5.5 (Communication with Opposing Parties); CCBE CODE Rule 5.6 (Change of Lawyer); CCBE CODE Rule 5.7 (Responsibility for Fees); CCBE CODE Rule 5.8 (Training Young Lawyers); CCBE CODE Rule 5.9 (Disputes among Lawyers in Different Member States).

64. Compare CCBE CODE Rule 2.3 (Confidentiality) and CCBE CODE Rule 3.2 (Conflict of Interest) with the conflicting Member State confidentiality and conflict rules discussed by the authorities cited *supra* note 51. See also CCBE CODE Rule 5.3 (Correspondence Between Lawyers) (adopting an educational approach with respect to the conflicting laws about the confidentiality of correspondence among lawyers, as opposed to adopting a substantive rule.)

65. See CCBE CODE Rule 3.8 (Clients' Funds); CCBE CODE Rule 3.9 (Professional Indemnity Insurance).

66. Compare CCBE CODE Rule 1.3.2 with CCBE CODE Rule 2.6.

67. See CCBE CODE Rule 2.5. The rule specifies that when a lawyer acts in the representation of a client before any public authority, the lawyer should, while there, use the "Host State" rules regarding incompatible occupations. *Id.* The rule also specifies that an established lawyer must observe the rules regarding incompatible occupations as applied to lawyers of the "Host State." *Id.*

the *CCBE Code* does at least make an attempt to provide guidance for these lawyers who are practicing in a "Host State" on a temporary basis. Given the lack of direction in the EC substantive law on the issue of how a lawyer is to choose between competing "Host" and "Home State" ethics rules, it is easy to understand why the CCBE might have believed that the *CCBE Code* would be a useful supplement to the EC substantive law on legal ethics.

c. Situation 3: A Fully Integrated, Established Lawyer

The third hypothetical situation posits a lawyer who has become established in the "Host State" to such an extent that the lawyer has become fully integrated into the "Host State" legal system and has adopted the particular title of lawyer which is used in that "Host State."

Lawyers seeking to become established in a "Host State" through full integration are not completely regulated at the moment. The *Lawyers' Services Directive* does not cover this situation since it applies only to the temporary or sporadic provision of services.⁶⁸ Moreover, at the moment, there is no directive on the establishment of lawyers. In 1992, the CCBE adopted a *CCBE Draft Directive on Rights of Establishment for Lawyers (Draft Directive on Establishment)*⁶⁹ and recommended it to the EC, but it has not yet been adopted by the EC Commission.⁷⁰ Thus, unlike Situation 2,

The rule says nothing, however, concerning lawyers providing services which do *not* involve representation in front of any public authorities and whether these lawyers must follow the "Host State's" rules regarding incompatible occupations. This omission occurs despite the fact that "incompatible occupations" is one of the "Host State" rules listed in the *Lawyers' Services Directive* Article 4(4) to which non-litigating lawyers are referred. *LAWYERS' SERVICES DIRECTIVE*, *supra* note 50, art. 4(4).

68. See *supra* note 52 and accompanying text.

69. See CCBE DRAFT DIRECTIVE ON RIGHTS OF ESTABLISHMENT FOR LAWYERS [hereinafter DRAFT DIRECTIVE ON ESTABLISHMENT, *reprinted in* LAWS. EUR., Nov.-Dec. 1992, at 12-13]. Additional background on the earlier negotiations and drafts is found in ADAMSON, *supra* note 37, at 60-61; Piet Wackie Eysten, *Establishment Directive, Where to Now?*, LAWS. EUR., May-June 1991, at 6-7; Heinz Weil, *The Proposal for a Directive on the Right of Establishment for Lawyers in the European Community*, 15 FORDHAM INT'L L.J. 699, 703-06 (1991-92); see also SPEDDING, *supra* note 56, at 156-68, 192-96; Roger Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443, 499-503 (1989) (analyzing an earlier ("Athenai") version of a proposed draft directive).

70. The EC Commission reportedly expects to have a draft "directive on establishment" available soon. See *Berichte: Vollversammlung des CCBE*, 1993 ANW.BL. 419 [hereinafter *Berichte I*]. A CCBE delegation which met with individuals at the EC Commission has reported that the CCBE draft was positively received at the Commission. *Id.*; see also Hamish Adamson, *Establishment Directive--Miracle of Barcelona Confirmed in Lisbon*, LAWS. EUR., Nov.-Dec. 1992, at 10-11 (noting that "[t]here now seems to be a good prospect that the Commission can make progress towards the production of a formal proposal for a Directive early in 1993," and listing the three conditions the Commission wanted satisfied in order to promote such a directive).

Indeed, the CCBE reportedly adopted its draft directive largely as a result of pressure from the EC Commission. The EC Commission staff person responsible for legislation regarding lawyers advised the CCBE that the Commission intended to begin draft legislation soon, with or without the CCBE's input. See Georg Frieders, *Der Stand der anwaltlichen Freizugigkeit nach Inkrafttreten des*

Situation 3 currently has no directive which expressly states, even generally, the applicable rules of conduct which apply to a fully integrated, established lawyer.⁷¹

Although the establishment of lawyers is unregulated in the sense that there is not yet a directive directly on point, the "establishment" of lawyers who intend to become fully integrated in the "Host State" is regulated to some extent through the *Council Directive of 21 December 1988 (Diplomas Directive)*.⁷² The *Diplomas Directive* sets forth the situations in which a "Host State" must recognize the qualifications of someone awarded a degree or diploma from another Member State. Thus, the *Diplomas Directive* sets forth the conditions under which the "Host State" must treat the professional qualifications of a lawyer from another Member State as the equivalent of the qualifications of the lawyers in the "Host State."⁷³

EWV-Vertrages, 1993 ANW.BL. 297, 300 [hereinafter Frieders I] (noting that pressure from the EC Commission was successful in leading to the passage on the *Draft Directive on Establishment* within six months).

71. *Accord CCBE COMPENDIUM*, *supra* note 17, ch. 5, at 50 ("[W]here a lawyer is, as to professional competence, qualified in the same way and to the same extent as the lawyers of the 'host' Member State, or his professional qualifications are recognised as being the equivalent of those of the lawyers in the 'host' Member State, in application of the fundamental principle [of nondiscrimination] of Article 7, the right of establishment may not be denied. *It is at present unregulated.*" (emphasis added). For an excellent overview of a lawyer's right to establishment and the relevant *EEC Treaty* provisions and case law, see Goebel, *supra* note 37, at 585-95. As Professor Goebel's discussion of the case law suggests, whatever ethics rules the "Host State" imposes will have to be capable of being objectively justified in order to be applied to the established lawyer. *Id.* at 589-92.

72. COUNCIL DIRECTIVE OF 21 DECEMBER 1988 (89/48/EEC) [hereinafter *DIPLOMAS DIRECTIVE* (dealing a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration)], *reprinted in* CCBE COMPENDIUM, *supra* note 17, ch. 5, at 13-27].

73. *Id.*; see also sources cited *supra* note 37. The substantive law of the *Diplomas Directive* is beyond the scope of this article. In brief, however, the *Diplomas Directive* requires, in essence, that each Member State recognize the higher education diplomas awarded by other Member States of comparable professionals *provided that*: 1) it is based on three years of university-level training; and 2) recognition is given only to the "finished product," i.e., someone who has completed all the necessary professional training which is required in addition to the post-secondary course. *DIPLOMAS DIRECTIVE*, *supra* note 72, art. 1(a). The "Host" Member State may require either a test or an adaptation period, but not both, if the matters covered by the professional qualifications in the "Home" Member State "differs substantially" from those required in the "Host State." *Id.* art. 4(b). The "Host State" may alternatively require a certain number of years of practical experience in the Home State if the education and training period in the "Home State" is at least one year less than is required in the "Host State." *Id.* art. 4(a). See ADAMSON, *supra* note 37, at 43-57; Goebel, *supra* note 37, 595-601; Lonbay I, *supra* note 37, at 11-12; Siskind, *supra* note 37, at 923-26.

The CCBE Member and Observer States have concluded that legal education throughout Europe "differs substantially," and therefore the States have the option of requiring either a test or an adaptation period as a way of ensuring the qualifications of foreign lawyers seeking to establish themselves. *DIPLOMAS DIRECTIVE*, *supra* note 72, art. 4(2). Thus, each Member and Observer State must now decide whether they will offer a test or an adaptation period in accordance with this *Diplomas Directive*. Although lawyers have argued that the *Diplomas Directive* should have permitted for an adaptation period followed by an exam, the *Diplomas Directive* clearly makes such cumulative

However, this *Diplomas Directive* deals only with the issue of when qualifications should be deemed equivalent, such that free movement is permitted and establishment may not be denied, and the conditions, if any, which may be imposed.⁷⁴ The *Diplomas Directive* states nothing about which rules of conduct apply to a professional such as a lawyer who becomes established in the "Host State."

The failure of the *Diplomas Directive* to address the topic of lawyer's ethics may not be surprising since the *Diplomas Directive* covers virtually all professions not previously regulated. What is surprising is the failure of the CCBE's *Draft Directive on Establishment* to address the topic of the ethics rules to be used by the fully integrated, established lawyer who is using the "Home State's" title.

The CCBE's *Draft Directive on Establishment* distinguishes between, and sets forth the requirements for, both fully integrated, established lawyers who would use the "Host State's" title of lawyer (Situation 3) and lawyers who are not fully integrated, who use only their "Home State's" title (Situation 4) and who are called "registered" lawyers.⁷⁵ Although the *Draft Directive on Establishment* addresses the topic of which ethics rules should apply to the registered lawyer in situation 4, it is silent on the issue of which ethics rules a fully integrated, established lawyer is to use.⁷⁶ The drafters may have assumed that a fully established lawyer using the "Host State's" title would be subject to all of the "Host State's" ethics rules. Indeed, this assumption that a lawyer is subject to all of the "Host State's" ethics rules appears to be implicit in Article 9 of the *Draft Directive on Establishment*,

requirements improper. Hempel I, *supra* note 37 at 491-92. Accord George Frieders, *Eignungsprüfung oder Anpassungslehrgang — Die Qual der Wahl*, 1992 ANW.BL. 177, 179 [hereinafter Frieders II] (describing the difficult decisions participating countries must make in implementing either an exam or adaptation period for lawyers of other member states).

As of April 1993 all CCBE members except Belgium, Italy, Portugal, and Denmark had adopted legislation to implement the *Diplomas Directive* for lawyers. See *Berichte I*, *supra* note 70, at 419. It has been reported that in the CCBE's discussions, all Member States except Denmark indicated a preference for a test. Frieders II, *supra*, at 179. All the countries that have adopted implementing legislation have opted for the test rather than the adaptation period. *Id.* The format and contents of some of these tests are summarized in chart form in Lonbay II, *supra* note 37, at 7-9. The examinations in all of the countries summarized by Professor Lonbay included a section on the country's professional conduct rules. *Id.* An almost up-to-date summary in English of the status of each Member State's progress towards implementation of the *Diplomas Directive* is found in ADAMSON, *supra* note 37, app. 3 at xxviii. A fairly current detailed analysis of the Member State's implementing legislation is found in THE LEGAL PROFESSIONS IN THE NEW EUROPE (Alan Tyrrell & Zahd Yaqub eds., 1993) which summarizes the organization and regulation of the legal profession in all twelve EC States.

74. DIPLOMAS DIRECTIVE, *supra* note 72, pmbl.

75. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, arts. 4, 5, 7.

76. *Id.* art. 8. Article 8 of the *Draft Directive on Establishment* specifically addresses the topic of "Rules of Conduct Applicable to Lawyers Registered under their Home Title" [Situation 4 in this article]. There is no explicit counterpart in the draft directive which addresses the "Rules of Conduct Applicable to Lawyers Practicing under the Title of the Host State."

which establishes a procedure for disciplinary proceedings against a fully established lawyer.⁷⁷

However, even if the *Draft Directive on Establishment* is adopted and even if Article 9 is interpreted to mean that the fully established lawyer is subject to all of the ethics rules of the “Host State,” the substantive EC law is still less than complete as to which ethics rules the fully integrated, established lawyer should use. Lawyers are without any real guidance, as neither the *Draft Directive on Establishment* nor any other substantive EC law tells an established lawyer how to balance conflicting ethical provisions of the “Home State” and “Host State.” One commentator recently stated that the adoption of the *Diplomas Directive* and the resulting establishment of lawyers is

likely to cause an early clash of deontological rules, which, in the author’s opinion, are all far from resolved by the CCBE Common Code of Conduct. The applicants under the [Diplomas] [D]irective will thus be paving the way to the future, by ironing out issues of conflicting rules on publicity, employment, and the like, to say nothing of potential problems connected with liability insurance and indemnity policies (or lack thereof).⁷⁸

Unfortunately, just as the *CCBE Code* has not completely instructed a lawyer about how to resolve the clash of deontological rules in Situation 3, the silence of the *Draft Directive on Establishment* on the issue of which ethics rules an established lawyer should follow means that it too has failed to resolve this issue. There is obviously a need for gap-filling here, as in Situation 2. Thus, just as the *CCBE Code of Conduct* serves a useful function in supplementing the substantive EC law on a lawyer’s temporary provision of services, there is a role the *CCBE Code* could play in supplementing the proposed EC substantive law on a lawyer’s right to become established.

77. The assumption is supported indirectly by language found in Article 9. The article states:

In the event of non-compliance with the obligations imposed on a lawyer established in the Host Member State, the competent authority of that State shall, subject to the provisions of this Article, Article 8.4 [indicating that lawyers performing professional activities in connection with institutions of the EC or Council of Europe are subject only to the ethical rules and disciplinary control of the Home State], Article 8.5 [indicating which ethics rules apply in the United Kingdom and Ireland] and Article 10 [establishing the disciplinary proceedings for registered lawyers], determine in accordance with its own rules and procedures the consequences of such non-compliance.

Id. art. 9(1) (emphasis added).

It also is a matter of common sense that a fully integrated lawyer must comply with the “Host State’s” ethics rules since, by definition, the lawyer in Situation 4 is fully integrated as a “Host State Lawyer.” There are limits, however, on the “Host State’s” ability to insist on rules for the established lawyer which cannot be objectively justified. See Goebel *supra* note 37, at 589-92.

78. Lonbay II, *supra* note 37, at 10. See also *supra* notes 56, 63-69 and accompanying text.

d. Situation 4: A Lawyer Wishes to Become Established Without Becoming Fully Integrated — the “Registered” Lawyer

At the moment, as is true for fully integrated, established lawyers, there are no substantive EC Directives which specifically address the topic of established “registered” lawyers. Thus, there are no regulations which specify the rules of professional conduct which a registered lawyer in Situation 4 should use. This could soon change if the CCBE’s *Draft Directive on Establishment* is adopted by the EC,⁷⁹ however, because this draft directive creates the category of “registered lawyer” and specifically addresses the issues faced by these lawyers.⁸⁰

Article 8(1) of the *Draft Directive on Establishment* sets forth the general rule about which ethics rules a registered lawyer is to use. This provision requires a registered lawyer to use the “Host State’s” ethics rules.⁸¹ Article 8(1), however, adds three additional conditions to this simple rule. The first condition indicates that this general rule is subject to other provisions in the *Draft Directive on Establishment*.⁸² For example, Article 11 authorizes a registered lawyer to use, in the “Host State,” the name of a firm with which the lawyer practices, even if the “Host State’s” rules otherwise prohibit the use of firms or firm names.⁸³ This “subject to the provisions of this directive” language thus serves as the basis for an exception to the general rule.

The second condition imposed in Article 8(1) states that a registered lawyer is subject to the “Host State’s” rules only to the extent that they are not inconsistent with the *CCBE Code* provisions.⁸⁴ Thus, to the extent the *CCBE Code* resolves some of the conflicts among Member State rules by adopting substantive provisions, those substantive CCBE provisions should take precedence over the “Host State’s” rules. The third condition found in Article 8(1) states that a registered lawyer must follow the “Host State’s”

79. See *supra* note 70.

80. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 5. For background on the dispute about whether the EC substantive law independently recognized the category of “registered lawyers” or whether a directive establishing such a category should be created, see ADAMSON, *supra* note 37, at 63-64; Eysten, *supra* note 69, at 6-7; Goebel, *supra* note 37, at 604-05, 617-21; Weil, *supra* note 69 at 704-05, 709. See also EXPLANATORY MEMORANDUM TO DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 46, at xxxviii & xli. As these materials explain, some compromises were made by excluding “registered lawyers” from certain types of representation. These exceptions, which generally track the exceptions in the *Lawyers’ Services Directive*, prohibit “registered lawyers” from preparing formal documents in the administration of decedents’ estates, transferring title in real estate, or general courtroom practice. See DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 6; see also Weil, *supra* note 69, at 707-08 (discussing certain considerations which influenced the drafting of Article 6).

81. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 8(1).

82. *Id.*

83. *Id.* art. 11.

84. *Id.*

rules "[w]ithout prejudice to the obligations incumbent upon him in his "Home" Member State."⁸⁵ As noted previously, this "without prejudice" language provides less than ideal guidance to the lawyer wanting to know which ethics rules to use.⁸⁶

After Article 8(1) sets forth the "general rule," as modified by these three conditions, the *Draft Directive on Establishment* continues with four additional subsections that further explain which ethics rules a registered lawyer should use. For example, Article 8(2) requires the "Host State" to insure that its rules are applied consistently with the *CCBE Code* and the *EEC Treaty* and also requires that the "Host State's" rules be objectively justified by the public interest.⁸⁷ Article 8(3) provides that if both the "Host" and "Home State" have mandatory malpractice insurance requirements or provisions guaranteeing the safety of client funds, then the "Host State" must interpret its rules in such a way as to avoid subjecting the registered lawyer to duplication.⁸⁸

Article 8(4) sets forth special rules for lawyers whose practice is limited to EC substantive law, as opposed to the domestic law of the "Host State."⁸⁹ According to this section, these lawyers are subject to their Home State's ethics rules rather than the "Host State's" rules.⁹⁰ Finally, Article 8(5) explains how to apply in Ireland and the United Kingdom the general rule that a registered lawyer should use the "Host State" rules.⁹¹ (This explanation is necessary since Barristers and Solicitors each have their own set of rules.)

As this review of Article 8 shows, if the *Draft Directive on Establishment* is adopted, it clearly will provide additional guidance on the proper ethics rules for a registered lawyer. It also will add a seal of approval to the *CCBE Code*. However, even if the draft directive is adopted, it also seems clear that there is room for the *CCBE Code*. A lawyer trying to abide by Article 8(1) of the *Draft Directive on Establishment*, for instance, may turn to the *CCBE Code* for guidance. In this one article, the directive tells registered

85. *Id.*

86. See *supra* notes 56, 60.

87. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 8(2). The European Court of Justice already has had several occasions to rule that legislation affecting lawyers was too restrictive and not objectively justified. See Case 427/85, Commission v. Federal Republic of Germany, 1988 E.C.R. 1123, 2 C.M.L.R. 677 (1989); Judgement of the Court of 10 July 1991 in Case C — 294/89: Commission of the European Communities v. French Republic (*Lawyers-Freedom to Provide Services*), 1991 O.J. (C 203) 11. As one commentator noted, this substantive EC law requiring that legislation be objectively justified ultimately may serve as the basis for invalidating traditional rules regarding compulsory fee schedules, restrictions on advertising, contingent fees, and rules regarding professional compatibility. Goebel, *supra* note 37, at 633.

88. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 8(3). Not surprisingly, the draft directive thus follows the approach adopted in the *CCBE Code*. See *CCBE CODE* Rule 3.9.

89. DRAFT DIRECTIVE ON ESTABLISHMENT, *supra* note 69, art. 8(4).

90. *Id.*

91. *Id.* art. 8(5).

lawyers to follow the "Host State's" rules, to act without prejudice to the "Home State's" rules, to ignore the "Host State's" rules if they are inconsistent with the *CCBE Code*, and to use those rules specified in any other provision of the *Draft Directive on Establishment*. A registered lawyer could easily be confused. Given the confusion created by this draft directive, the *CCBE Code's* distinction between conflict of interest provisions and substantive ethics provisions serves a useful function because it provides some substantive provisions and tends to notify registered lawyers of the areas in which the "Host State's" ethics rules may differ from the ethics rules of the lawyer's "Home State."⁹² Furthermore, as the *CCBE Code* is refined, it undoubtedly will provide even clearer guidance on which ethics rules a registered lawyer should use in various situations. Thus, the *CCBE Code* can serve a useful function by trying to sort out these competing obligations and provide specific rules and directions.

In short, as this section of the article has shown, the substantive EC law is not always clear nor specific in advising a lawyer in Situations 2-4 which rules of professional conduct the lawyer should use. Thus, it appears that the *CCBE Code* is not simply a superfluous addition to the EC substantive law on the proper ethics rules for lawyers who provide services or become established in a Host State. It can provide much-needed help to lawyers confused by the EC law on the subject.

4. Summary

In sum, then there is no simple answer to the question of when the *CCBE Code* will apply. The most sensible approach is to view Rule 1.5 of the *CCBE Code* as a self-contained provision.⁹³ Under this approach, Rule 1.5 would require that the *CCBE Code* be used whenever a lawyer subject to the *CCBE Code* is involved in "cross-border activities," as defined in Rule 1.5. Under this analysis, one could look to the *CCBE Code*, rather than substantive EC law, in order to determine which ethics rules to use. The *CCBE Code* would be viewed as an attempt to codify and supplement the existing substantive EC law; the EC law would be relevant only to measure the validity of the *CCBE Code* and to determine whether the *CCBE Code* is a proper enactment.

If, however, Rule 2.4 is ultimately viewed as withdrawing jurisdiction from Rule 1.5., then for each ethics issue one would have to consult the EC substantive law to see whether it has overridden the jurisdictional grant in Rule 1.5.⁹⁴ Under this perspective, in order to determine what the *CCBE*

92. See *supra* text accompanying notes 26, 63.

93. See *supra* notes 13-16 and accompanying text.

94. See *supra* notes 17-34 and accompanying text.

Code means, one would have to first locate the relevant EC substantive law and then determine what that substantive EC law says about the issue. Thus, when faced with a legal ethics question a lawyer would not be able to simply consult the *CCBE Code* but instead would have to research the substantive EC law.

Moreover, if the *CCBE Code* is *not* viewed as an attempt to codify and supplement the substantive EC law on the issue of which ethical rules a lawyer should use, then one is left with the question of how the *CCBE Code* and EC substantive law are intended to fit together. Because even if the *CCBE Code* has been adopted by the Member States and therefore is binding in each Member State, EC law should take precedence over Member State law on the issue of which ethics rules should be used by an established lawyer or a lawyer providing services in a Member State.⁹⁵ For these reasons, the question of when the *CCBE Code* applies is not completely straightforward. The Member States in the EC, their courts, and the EC Courts may have to struggle with this question before arriving at a definitive answer. The section that follows discusses how these bodies have already begun to do this.

II. IMPLEMENTATION AND EVOLUTION OF THE *CCBE CODE*

So far, this article and its predecessor have addressed what the *CCBE Code of Conduct* says and when it applies. These two questions, however, provide only part of the picture. In addition to knowing what a legal ethics code says and in which situations it will apply, it is interesting to know by whom and by what means the legal ethics code will be enforced and implemented. This section addresses the issue of how the *CCBE Code* is enforced through disciplinary action and in the courts and focuses on one country's efforts to implement its provisions.

A. DISCIPLINARY ENFORCEMENT OF THE *CCBE CODE*

The *CCBE Code* does not contain any express provisions about who should enforce it or how. Despite this silence, the structure of the *CCBE Code* provides guidance on this issue. As was explained more fully in Part I of this article, the *CCBE Code* itself has no binding force.⁹⁶ Instead, it becomes enforceable only upon its adoption by the *CCBE* Member and Observer States.⁹⁷ Thus, one can assume that in each adopting state, the *CCBE Code* would be enforced in the same manner and by the same entities that enforce the ethics rules applicable to a lawyer's purely domestic

95. See *supra* note 28.

96. See PART I, *supra* note 1, at 11-15 nn.37-49 and accompanying text.

97. See *id.* at 12 nn.38-39.

activities, as opposed to the lawyer's cross-border activities. To date, however, research reveals no reported disciplinary enforcement by a Member State of a CCBE provision.

Although disciplinary enforcement of the *CCBE Code* appears to be left up to each adopting Member State, the CCBE does have a procedure which can be used to assist the Member States engaged in disciplinary enforcement. The CCBE Council for Advice and Arbitration (CCBE Council) was established by the CCBE in accordance with a 1974 resolution and a 1978 amendment.⁹⁸ The mission of the CCBE Council is to "make itself available to professional organisations of lawyers and their members, to give opinions on issues of professional conduct and to settle their differences by arbitration."⁹⁹ As explained in the introductory paragraphs of the 1974 resolution, the CCBE Council's goal was to provide a mechanism for resolving disputes about ethics rules while still maintaining individual country enforcement of the ethics rules.¹⁰⁰ In approximately twenty years, however, the CCBE Council has only been called upon to issue one

98. See CCBE INFORMATION BROCHURE ON THE COUNCIL FOR ADVICE AND ARBITRATION (1980)[hereinafter CCBE BROCHURE].

99. *Id.*

100. The relevant language of the resolution creating the Council for Advice and Arbitration provides:

Whereas the Consultative Committee is the body whose institutional role is the co-ordination and harmonisation of the rules of professional conduct within the European Community;

Whereas the growth in cross-frontier practice has raised problems as to the application of the existing professional rules in the country of origin or in the host country, and gives rise to conflict between the rules of the different countries;

Whereas the public interest requires that the definition and enforcement of the rules of professional conduct should be the prerogative of the professional organisations themselves;

Whereas the need therefore exists to set up a procedure which will allow the professional organisations voluntarily to seek the advice or the decision of the Consultative Committee on matters concerning the cross-frontier activities of their members . . .

[the Consultative Committee has made itself available to act as arbitrator.]

Id. § A (Resolution). *Accord* CCBE COMPENDIUM, *supra* note 17, ch. 3, at 38.

The resolution that created the Council also established the procedures by which it operates. Submission of a question to the Council is voluntary. *Id.* § B(III) (Rules of Procedure). Moreover, an individual lawyer has no right to go directly to the Council. Instead, a matter is referred to the Council by the professional organizations which represent the lawyer in question. *Id.*

The Council consists of a Standing Committee, which includes the current and former presidents of the CCBE, a Secretary-General appointed for a period of two years, and Advisory and Arbitration Tribunals appointed for each case by the Standing Committee. *Id.* § B.II. (Rules of Procedure). The Advisory and Arbitration Tribunals each consist of an uneven number of members, with no fewer than three and no more than nine members, each being of different nationality and a member of a CCBE Delegation other than the delegation of the applicant. *Id.* The parties to the dispute will be represented by one of the members of their bar's delegation to the CCBE. *Id.* §B. (IV) (c). (Rules of Procedure).

decision, and the procedure for dealing with complaints has been described as "virtually unused."¹⁰¹

Although to date there has been no mandatory mechanism which guarantees enforcement of the *CCBE Code* by either the CCBE Council or the individual member states, that could soon change. The CCBE's *Draft Directive on Establishment* covers the topics of discipline and enforcement. If the CCBE's *Draft Directive on Establishment* is adopted by the EC, these provisions would become binding.

The *Draft Directive on Establishment* sets up two different discipline procedures, depending on whether a lawyer is a registered lawyer using only the "Home State" title or instead is a fully integrated, established lawyer who also uses the "Host State's" title.¹⁰² For established lawyers, the *Draft Directive on Establishment* basically permits the lawyer to be disciplined by the "Host State" in the normal fashion, so long as the "Host State" notifies the "Home State" of the charges and permits representatives of the

101. ADAMSON, *supra* note 37, at 66.

102. Article 9 of the *Draft Directive on Establishment* provides as follows:

1. In the event of non-compliance with the obligations imposed on a lawyer established in the Host Member State, the competent authority of that State shall, subject to the provisions of this Article, Article 8.4 [indicating that lawyers performing professional activities in connection with institutions of the EC or Council of Europe are subject only to the ethical rules and disciplinary control of the Home State], 8.5 [indicating which ethics rules apply in the United Kingdom and Ireland] and Article 10 [establishing the disciplinary proceedings for registered lawyers], determine in accordance with its own rules and procedures the consequences of such non-compliance. However, that authority must permit the presence in the proceedings of a representative of the competent authority of the Home Member State of the lawyer concerned. At his request, that representative shall be permitted to present his observations at the hearing.

2. In the event of a complaint against an established lawyer being accepted for adjudication by the competent authorities of the Host Member States, those authorities shall immediately bring that fact to the notice of the competent authorities of the Home Member State and shall inform them of the institution of any disciplinary proceedings and of any decision taken.

3. The competent authorities of the Home Member State shall likewise inform the competent authorities of the Host Member State of any decision taken concerning an established lawyer.

4. There shall be a right of appeal from the decision of the competent authority of the Host Member State.

5. The provisions of this article are without prejudice to the right of the competent authority of the Home Member State to take any disciplinary measures in respect of any activities of a lawyer of a Home Member State carried out in the Host Member State.

6. An authority which is competent to impose disciplinary sanctions under Articles 9 and 10 (including the panel to be set up under Article 10) shall be deemed to be a 'court or tribunal' within the meaning of Article 177 of the Treaty.

disciplinary authority from the “Home State” to comment on them.¹⁰³ In addition, the “Host State” authorities are required to inform the “Home State” of the institution and resolution of any charges filed.¹⁰⁴

With respect to registered lawyers, however, the *Draft Directive on Establishment* establishes an entirely new disciplinary procedure. The directive requires a Host State that is considering bringing charges against a registered lawyer first to notify the “Home State” authorities.¹⁰⁵ The

103. *Id.*

104. *Id.*

105. Article 10 of the *Draft Directive on Establishment* provides as follows:

Disciplinary Proceedings — Special Provisions for Lawyers Registered Under Their Home Titles

Supplementary to the provisions of Article 9, for lawyers registered under their home title the following rules of procedure shall apply:

1. If the competent authorities of the Host Member State are considering the institution of disciplinary proceedings against a lawyer referred to in this article, they shall first bring that fact to the notice of the competent authorities of the Home Member State and provide full information on the specific breaches of obligations, which are alleged, and the nature of the case.
2. Within two months from the receipt of such notification the competent authority of the Home Member State shall be entitled to require the competent authority of the Host Member State to set up a mixed panel of representatives of the Host Member State and the Home Member State to hear and determine the case. Such panel shall consist of three representatives from the Host Member State and two representatives from the Home Member State.
3. The panel shall apply the rules of procedure and the sanctions of the Host Member State, except that
 - (a) the panel must permit a representative of the competent authority of the Home Member State to be present and to make his observations at the hearing.
 - (b) the panel shall endeavor to reach a unanimous decision, but in the event that it is unable to do so the decision will be taken by majority, and if so members of the panel shall be entitled to give dissenting opinions and to require these to be recorded in the findings and the sentence.
4. The panel shall be convened, shall hear and decide upon the case within a reasonable time. The lawyer and the competent authority of the Home Member State shall be given sufficient time to reply to the charge.
5. The competent authority of the Host Member State may take interim measures in urgent cases in accordance with the rules and procedures of the Host Member State.
6. A decision of the competent authority of the Host Member State can affect professional practice only within the jurisdiction of that authority. The competent authority of the Home Member State shall determine in accordance with its rules and procedures the consequences of such decision.
7. If for any reason a lawyer referred to in this Article is deprived temporarily or permanently of the right to carry on the profession in the Home Member State such prohibition shall automatically carry with it, for that lawyer, the prohibition, temporary or permanent, against carrying on his profession in the Host Member State, and where appropriate removal from the register of the competent authority of the Host Member State.

"Home State" authorities then can require the "Host State" within two months to set up a panel of three representatives from the "Host State" and two representatives from the "Home States" to determine the case.¹⁰⁶ The rules of procedure of the "Host State" will be used, although the "Home State" representatives are permitted to be present and to make observations. In the event that there is not a unanimous opinion, the dissenters are permitted to file a dissenting opinion and record it with the decision.¹⁰⁷

Thus, the *Draft Directive on Establishment* goes further than the *CCBE Code* in that it explicitly acknowledges some of the procedural issues that arise when lawyers are registered in multiple jurisdictions and one state seeks to discipline a lawyer from another state. However, because the *Draft Directive on Establishment* has not yet been adopted, there are no reports of disciplinary cases decided using these procedures.¹⁰⁸

B. JUDICIAL RECOGNITION OF THE CCBE CODE

Whenever a professional code of conduct exists, a natural question is whether and how the code will be cited by the courts. In the United States, the ethics codes have been cited by the courts, inter alia, in the context of disciplinary actions, disqualification motions, and malpractice actions.¹⁰⁹ The *CCBE Code* also has been cited in the courts, although such citation is not, at the moment, widespread. The *CCBE Code* reportedly was cited in two decisions of the Court of Appeal in Bordeaux, France, as a basis for striking down certain local bar rules.¹¹⁰ The court apparently concluded that the local rules were incompatible with Rules 2.2 and 2.7 of the *CCBE Code*.¹¹¹ According to the representative of the CCBE who reported on these cases, "[i]t is not clear whether this was on the basis of specific incorporation of the Code in the relevant national rules, or on the more general principle that the Code should be taken as representing the consensus of opinion on professional rules in the Community and as such to

106. *Id.*

107. *Id.*

108. The issue of determining who should regulate and discipline lawyers who are licensed in multiple jurisdictions has proved difficult in the United States as well. In August 1993, the ABA revised *Model Rule 8.5* in order to address the issue of multi-jurisdictional discipline. See *ABA Committee Seeks Change to Model Rule of Jurisdiction*, [9 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 173 (1992) (reprinting the text of revised *Model Rule 8.5*); *ABA Adopts Several New Rules, Approves Certification Groups*, *id.* at 236 (1993) (reporting on the adoption of revised *Model Rule 8.5* at the August 1993 Annual Meeting.)

109. See CHARLES L. WOLFRAM, *MODERN LEGAL ETHICS* §§3.3.1, 3.3.2 at 85-94, §5.6.2 at 212, § 7.1-7.3 at 312-58 (1986) (discussing numerous cases heard in jurisdictions throughout the United States where the court looked to the *Model Rules* or the *Model Code of Professional Responsibility* (1981)).

110. See ADAMSON, *supra* note 37, at 73.

111. *Id.*

be treated as, in a sense, part of Community Law.”¹¹² To date, research reveals no other cases that have cited the *CCBE Code*.

C. A REVIEW OF ONE COUNTRY’S EFFORT TO IMPLEMENT THE *CCBE CODE* — AUSTRIA

Given the dearth of case law or disciplinary action under the *CCBE Code*, it is somewhat difficult to assess the true impact of the *CCBE Code* to date. One country’s response to the *CCBE Code*’s provisions, however, provides an interesting case study for assessing the code’s success so far. In order to illustrate how the *CCBE Code* can affect a country’s legal ethics provisions, this section of the article reviews Austria’s response to the *CCBE Code* and its efforts to implement the code.¹¹³

In its “Purpose” section, the *CCBE Code* requires three things of its signatories: education, adoption, and consideration during reform.¹¹⁴ Austria’s response to the *CCBE Code of Conduct* has included all three of these. The sections that follow review each type of effort in turn.

112. *Id.* The *CCBE Code* has been cited in other contexts, however. For example, when the United Kingdom issued a “green paper” concerning mixed partnerships between solicitors and other professionals, a submission of the United Kingdom’s delegation to the CCBE asked the government to consider whether the proposals were fully compatible with EC practice and the *CCBE Code*, suggesting that some aspects were not. See Robert Rice, *Mixed Partners Face European Problems*, FIN. TIMES, May 8, 1989, at I30.

113. Austria, an Observer State, was chosen for review because the author spent her sabbatical conducting research in Vienna, Austria. While a case could be made for looking at any one of the EC Member or Observer States, Austria provides an interesting example since lawyers are particularly closely regulated in Austria. Indeed, in a comparison prepared by the CCBE of the schooling and training required for lawyers, Austria’s requirements were the stiffest. See Hempel I, *supra* note 37, at 492. Although Austria currently is only an Observer State in the CCBE, its implementation should still be of interest since Austria has been a member of the CCBE since 1973. *Id.* at 488. Furthermore, the CCBE has determined that Austria will become a Member State once the European Economic Area comes into force. PART I, *supra* note 1, at 13 n.42.

114. *CCBE Rule* 1.3.2 states:

The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

—be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Community;

—be adopted as enforceable rules as soon as possible in accordance with national or Community procedures in relation to the cross-border activities of the lawyer in the European Community;

—be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

CCBE CODE Rule 1.3.2 (emphasis added).

The signatories to the *CCBE Code* included all twelve Member States of the EC and the official Observer States. CCBE COMPENDIUM, *supra* note 17, ch. 4, at 13-14. See also PART I, *supra* note 1, at 13-14 nn.41-44 and accompanying text (noting conflicting reports as to whether or not all Member States have in fact adopted the *CCBE Code*).

1. Education Efforts

Austria's efforts to educate its lawyers about the *CCBE Code* have included both Continuing Legal Education (CLE) sessions and a series of articles about the *CCBE Code*.¹¹⁵ The primary authors of these articles are current or former members of the Austrian delegation to the CCBE.¹¹⁶ These articles, which have appeared since the adoption of the *CCBE Code* by the CCBE in 1988, have explained the *CCBE Code*, its effect in Austria, and the interrelationship of provisions in the Austrian legal ethics code and the provisions of the *CCBE Code*.¹¹⁷ These articles have mainly appeared in the *Österreichisches Anwaltsblatt*, which is the official journal of the Austrian National Bar Association (ÖRAK) and is received free of charge by all Austrian lawyers.¹¹⁸ This monthly journal, a publication similar to the *ABA Journal*, provides the forum for most articles on Austrian legal ethics.

In addition to these articles, both the *CCBE Code* and the integration of

115. See *infra* notes 117-125 and accompanying text.

116. Both Drs. Hempel and Frieders have been members of the official 3-person Austrian delegation to the CCBE. See CCBE BROCHURE, *supra* note 98; Karl Hempel, *Der CCBE-Standesrechtskodex und das österreichische anwaltliche Standesrecht*, 1991 ANW.BL. 209 [hereinafter Hempel II].

117. See, e.g., Hempel I, *supra* note 37, at 494. This article reviews the issue of "establishment of lawyers" in the EC and the relevance of this issue for Austria, including whether Austria should join the EC. It also includes a brief discussion of the problem of "double deontology" and the solution presented by the *CCBE Code*; Hempel II, *supra* note 116, at 209 (discussing the implementation of the *CCBE Code* and its effect in Austria now that the code has evolved). See also *Berichte: Europäische Präsidentenkonferenz* 1993 ANW.BL. 165 [hereinafter *Berichte II*] (reporting on the meeting of European bar presidents in Vienna, including an explanation of the CCBE's meeting in Vienna); *Berichte: Anwalts-Europa in Wien* 1993 ANW.BL. 251 [hereinafter *Berichte III*] (same); Frieders I, *supra* note 70, at 297 (summarizing the impact on the legal profession of entrance into the EC as well as the new Austrian law implementing changes for lawyers); *Berichte I*, *supra* note 70, at 419 (reporting on Austria's full membership in the CCBE upon the effectiveness of its entrance into the European Economic Area and on the latest activities of the CCBE, including the EC Commission's consideration of a "Draft Directive on Establishment"); Georg Frieders, *Was erwartet die österreichische Rechtsanwaltschaft im Zuge der europäischen Integration*, 1992 ANW.BL. 617 [hereinafter Frieders III] (discussing what the future holds for Austrian lawyers as they continue to witness the process of European integration); Georg Frieders, *Erweiterung des Geltungsbereiches des CCBE-Standesrechtskodex bei entsprechender Unterwerfungserklärung*, 1992 ANW.BL. 24 [hereinafter Frieders IV] (reporting that at the October 1991 CCBE plenary session, Austria signed an agreement with five Observer States which provided that the *CCBE Code* applied to cross-border practice between Observer States).

One of the authors of these articles, Dr. Hempel, is undoubtedly well-known to many Austrian lawyers because, among other things, he was the Vice-President of the Vienna Bar Association (*Rechtsanwaltskammern*), which is the mandatory bar association for all lawyers practicing in Vienna. (Vienna is both the federal capital of Austria and one of Austria's nine provinces. Thus, as a province, Vienna has its own bar association which has primary responsibility for regulating the lawyers in that province.) See generally VERZEICHNIS DER RECHTSANWALTSKAMMERN UND DER RECHTSANWALTE IN ÖSTERREICH 27 (1991) (directory of lawyers); Hempel II, *supra* note 116, at 209 (discussing the harmonization of the *CCBE Code* with local provisions and the individual standards of both).

118. *Impressum*, 1993 ANW.BL. 3.

lawyers in Europe have been the topic of several CLE sessions. For example, in February 1991 the Vienna Bar Association sponsored a "retreat" for committees working on various issues of current interest to the bar.¹¹⁹ One of the themes considered was "Europa."¹²⁰ The issues and conclusions from this retreat were published in the *Österreichisches Anwaltsblatt* with the request that readers share their opinions on this topic.¹²¹ These topics of European integration of lawyers and the CCBE Code also repeatedly surfaced at the ÖRAK's "Lawyer's Day" conference in November 1991, which focused on the role of the Austrian lawyer in the year 2000.¹²² In the context of discussing changes needed to the legal ethics code and statutes regulating lawyers, reference was made to European integration.¹²³ Additionally, in emphasizing the need to remain a self-regulating profession, the report noted that the local bar associations must take into account the existence of the "new Europe" and the need for the bar associations to strive for harmonization of the ethics rules and the existence of cross-border practice.¹²⁴ Indeed, as the then Vice-President of ÖRAK concluded in May 1992, at the 20th Annual Conference of Presidents of European Lawyers' Association, EC integration and its effect on lawyers was a much discussed topic in the previous year.¹²⁵

In addition to these articles and discussions, Austrian lawyers also have ready access to the CCBE Code itself. There is no need to refer back to old issues of the bar journal or CLE handouts because, in the fall of 1991, a fourth edition of the collected statutes and administrative regulations governing lawyers was issued.¹²⁶ This pocket-sized hardback commentary on the "*Rechtsanwaltsordnung*" (Lawyer's Statute) and other provisions now includes the CCBE Code.¹²⁷ Thus, the Austrian and CCBE ethics codes are found in close proximity to one another.

119. 1991 ANW.BL. app. at I.

120. *Id.* app. at III-VI (emphasizing the new understanding that is developing regarding the role of the bar association in both the local and national arenas).

121. *Id.* app. at I.

122. See generally *Berichte: Rechtsanwalt 2000 — der Zeitgemäße Rechtsanwalt — Tradition im Wandel*, 1992 ANW.BL. 34 [hereinafter *Berichte IV*]. This eight-page report summarizes both the sessions held at the "Lawyer's Day" as well as recommendations offered by the various working groups. *Id.*

123. See *id.* at 35, 36.

124. *Id.* at 35.

125. *Berichte: 20. Europäische Präsidentenkonferenz — Wiener Advokatengespräche 1992*, 1992 ANW.BL. 297, 297-98 [hereinafter *Berichte V*] (reporting that the Presidents of the European Lawyers' Association have been engaged in discussions about political changes in Europe recently).

126. RECHTSANWALTSORDNUNG UND DISZIPLINARSTATUT SOWIE EINSCHLAGIGE VORSCHRIFTEN SAMT ERLAUTERNDEN ANMERKUNGEN UND VERWEISUNGEN (Walter Schuppich & Helmuth Tades eds., 4th ed. 1991)[hereinafter RAO] (statutory compilation of regulations governing Austrian lawyers which outlines their ethical responsibilities and disciplinary guidelines).

127. *Id.* at 208-23.

The success of these efforts to educate is hard to measure. On the one hand, it appears that an Austrian lawyer who attends bar meetings and reads the bar journal regularly should at least be generally aware of the effect of EC integration upon lawyers. And, such a lawyer probably has seen references to the *CCBE Code*. (Whether the lawyer remembers these references is, of course, another question.)

On the other hand, Austria's experience with the Lawyers' Professional Identity Card issued by the CCBE suggests that the education efforts may not have been completely successful and that Austrian lawyers may not yet be familiar with the *CCBE Code*.

The Lawyers' Professional Identity Card issued by the CCBE might be analogized to an International Driver's License issued in the U.S. by the American Automobile Association.¹²⁸ The identity card provides a certification that the named holder is a lawyer in the Member State and is authorized to pursue professional activities under the designated title.¹²⁹ This information is conveyed in all the relevant languages of the EC Member and Observer States.¹³⁰ The CCBE has issued two different versions of this Lawyers' Professional Identity Card — one card is for lawyers from the twelve member states of the EC; a different version was prepared for lawyers from the official Observer States of the CCBE,¹³¹ such as Austria. The two different types of Lawyers' Professional Identity Cards are also different colors; the card for EC lawyers is white¹³²; the card for Observer State lawyers is green.¹³³

If one uses the adoption of this ID card as a measure of the success of Austria's education efforts about the *CCBE Code*, then the education effort appears to be incomplete. In Austria, this Lawyers' Professional Identity Card, or *Berufsausweis für Rechtsanwälte*, is issued not by the ÖRAK but rather by the provincial bar associations, which have the initial responsibility for the regulation of the lawyers within each province.¹³⁴ By late 1991, this identity card was only available from two of the nine bar associations — namely, the bar associations of Wien (Vienna) and *Niederösterreich* (Lower Austria).¹³⁵ However, an Austrian report following the October 1991 semi-annual plenary session of the CCBE, stated that it was hoped that the

128. The Lawyers' Professional Identity Card is described in Hempel II, *supra* note 116, at 211-12, 220 and in Karen Brewer, *Identity Cards*, LAWS. EUR., July-Aug. 1991, at 16.

129. Hempel II, *supra* note 116, at 212.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. See Frieders IV, *supra* note 117, at 24 (expressing the hope that every Austrian bar association would soon adopt identity cards).

other Austria bar associations soon will follow suit.¹³⁶ Moreover, in terms of absolute numbers, very few of these Lawyers' Professional Identity Cards had been issued. As of January 1992, 18 such cards had been issued by the Vienna Bar Association. That is in contrast to over one thousand of such cards issued in Sweden.¹³⁷

In sum, the Austrian bar appears to have been quite active in its attempt to fulfill its obligation as a signatory of the *CCBE Code* and educate its lawyers about the existence and the effect of the *CCBE Code*. It is difficult to say, however, how successful those efforts have been. And, indeed, given the magnitude of changes to the legal profession that are involved, it is perhaps to be expected that the education occurs slowly.

2. Adoption Efforts

Austria has also taken steps toward fulfilling its second obligation as a signatory: adoption of the code. Austria's adoption of the *CCBE Code*, like that of other Member and Observer States, could be said to have begun with the acceptance of the *CCBE Code* by the Austrian delegation to the CCBE on October 28, 1988, in Strasbourg.¹³⁸ The *CCBE Code* recognizes, however, that the mere agreement by the national delegations to the CCBE was not enough to make the *CCBE Code* enforceable.¹³⁹ It therefore requires each of the signatories to take efforts to ensure that the *CCBE Code* is adopted as enforceable rules applicable to cross-border practice.¹⁴⁰

In keeping with the general approach of the EC, different methods have been used by the Member and Observer States to adopt the *CCBE Code* as enforceable rules. In some of the Member States, such as the bars in Great Britain, the *CCBE Code* is incorporated into the national ethics rules.¹⁴¹ In other Member States, such as Ireland, the *CCBE Code* has not been incorporated into the text of the national rules but is rather an appendix to the national ethics rules.¹⁴² In still other states, such as the Netherlands, Denmark, Portugal, and Belgium, the *CCBE Code* stands independently,

136. *Id.*

137. *Id.*

138. The delegations from Observer States such as Austria are non-voting members of the CCBE and are technically not bound by its actions and decisions. See CCBE COMPENDIUM, *supra* note 17, ch. 3, at 10-12. See also PART I, *supra* note 1, at 13-14 nn.42-44 and accompanying text. Each of the then six Observer States, however, entered into a separate agreement with the CCBE, in which it agreed to abide by the *CCBE Code*, as if it were a Member State. See Hempel II, *supra* note 116, at 213-20 for the complete text in German of the code and this agreement. Dr. Walter Schuppich signed this Agreement as President and on behalf of ÖRAK. *Id.* at 210.

139. See CCBE CODE Rule 1.3.2. Accord PART I, *supra* note 1, at 12 n.40 and accompanying text.

140. See CCBE CODE Rule 1.3.2. Accord PART I, *supra* note 1, at 12 n.40 and accompanying text.

141. See Hempel II, *supra* note 116, at 209.

142. *Id.*

next to the national ethics rules.¹⁴³ Finally, in those states with weak or nonexistent national bar associations or regulation of lawyers, such as Italy, France, and Greece, the *CCBE Code* has to be adopted through the local professional organizations in these countries.¹⁴⁴

The bar association in Austria, which has power to regulate lawyers, has opted to use a different approach.¹⁴⁵ In Austria, the *CCBE Code* is not integrated (“*eingebaut*”) into the Austrian legal ethics provisions, nor is the *CCBE Code* an official appendix (“*Anhang*”) to the Austrian provisions, nor is the *CCBE Code* placed next to the Austrian legal provisions as independent, enforceable regulations.¹⁴⁶ Instead of those approaches, Austria has chosen an approach which is based on use of the CCBE Lawyers’ Professional Identity Card described above. In order to receive the identity card described earlier, a lawyer must sign an acknowledgement that: 1) the lawyer is familiar with the *CCBE Code*; 2) with respect to cross-border practices, the lawyer personally submits to the *CCBE Code* and will treat it as a binding obligation; and 3) the lawyer agrees to return the international identity card when the lawyer no longer is willing to be so bound (or moves into the jurisdiction of another province).¹⁴⁷

Thus, Austria has adopted an approach which is based on the individual lawyer’s voluntary acceptance of the *CCBE Code* as binding on the lawyer’s cross-border activities. This approach may or may not prove adequate. On the one hand, there are several advantages to this approach. Because this approach is based on a lawyer’s voluntary acceptance of the *CCBE Code*, it provides for immediate implementation upon a lawyer’s receipt of the identification card. There is no need to wait for the Austrian legislature to amend the *RAO* (the statute regulating lawyers) or for the *ÖRAK* to amend the legal ethics code. Second, this voluntary approach avoids some of the thorny issues that might be raised if the adoption of the *CCBE Code* was effected through the bar’s amendment of the legal ethics code. (It is not obvious to this author that the Austrian legislature’s delegation of authority to the bar to create binding administrative regulations would include the power to regulate such cross-border activities.) Third, this approach may serve an educational function and therefore make it more likely that an individual lawyer is aware of the existence of the *CCBE Code* and actually

143. *Id.* at 209-10.

144. *Id.* at 210.

145. *Id.* at 212. The Austrian bar, however, has a more official function in Austria than does the ABA in the United States. The *RAO* (or lawyer’s statute) establishes *ÖRAK*, and specifies its responsibilities. See *RAO*, *supra* note 126, § 35-44. Among other things, the legislature has delegated to *ÖRAK* the responsibility for developing enforceable administrative guidelines or “*Richtlinien*” which regulate the lawyer’s practice and various ethics issues. *Id.* § 37.

146. See Hempel II, *supra* note 116, at 212.

147. *Id.*

takes the trouble to study its provisions. Finally, this approach would, in essence, permit the Austrian bar to adopt the *CCBE Code* in stages. After initially publicizing the *CCBE Code*, the bar could later make it binding, at a time when Austrian lawyers presumably are more familiar with the *CCBE Code* and thus more comfortable with its adoption.

The primary disadvantage of this approach is that it is dependent on the Austrian lawyer's knowledge and acceptance of this identification card. Given the relatively short amount of time that has passed since publication of the existence of such an identification card,¹⁴⁸ it is probably unfair to use the 1992 statistics as a sign that this approach will be unsuccessful. However, even if the number of Austrian lawyers who accept such an identification card dramatically climbs, this system still permits a situation in which an Austrian lawyer is involved in cross-border practice without having signed the agreement accompanying the identification card. This lawyer would not technically be bound to use the *CCBE Code*. One can imagine, for example, an Austrian lawyer who stays entirely within Austria, working for Austrian clients on matters that will take place in Austria and that are governed by Austrian law. This Austrian lawyer may not obtain the *CCBE* identification card because the lawyer will perceive himself as engaged only in "domestic" practice. According to the definition used in the *CCBE Code*, however, if this lawyer works with a foreign language, this "domestic" Austrian lawyer is engaged in cross-border practice.¹⁴⁹ Thus, Austria's approach which is based on a lawyer's voluntary acceptance of the card may result in an incomplete implementation of the *CCBE Code*.

In sum, while Austria has not yet made the *CCBE Code* binding on all Austrian lawyers, it has taken some steps in an effort to fulfill its duty to adopt the *CCBE Code*.

3. Consideration of Any Reform Efforts Needed in Order to Harmonize the *CCBE Code* and Domestic Legal Ethics Provisions

In addition to education and adoption, *CCBE Rule* 1.3.2 required that the *CCBE* rules "be taken into account in all revisions of national [legal ethics] rules[,] . . . with a view to their progressive harmonization."¹⁵⁰ Following adoption of the *CCBE Code*, an Austrian committee began looking at the issue of whether the provisions of the *CCBE Code* collide with Austria's legal ethics provisions.¹⁵¹

148. The existence of such a card was publicized in April 1991. *Id.*

149. *CCBE CODE* Rule 1.5.

150. *CCBE CODE* Rule 1.3.2.

151. See Hempel II, *supra* note 116, at 211. Austria's legal ethics provisions are found in the administrative guidelines called RL-BA 1977 (Richtlinien für die Ausübung des Rechtsanwaltsberufes, für die Überwachung der pflichten des Rechtsanwaltes und für die Ausbildung der

In April 1991, the *Österreichisches Anwaltsblatt* reported the conclusion of this working group: it saw no reason to recommend that the Bar Association reject the applicability of the *CCBE Code* to Austrian lawyers.¹⁵² As the committee reported, the *CCBE Code* reflects the ethical understanding of Austrian lawyers.¹⁵³ Although the committee concluded that the *CCBE Code* did not collide with the Austrian ethical rules, Dr. Hempel summarized, on behalf of the committee, five provisions which had required the most analysis.¹⁵⁴

The five provisions which required special scrutiny included provisions dealing with the following issues: the safekeeping of client funds; ex parte contacts with judges; a lawyer's withdrawal from a case; correspondence between lawyers; and the conflict between a lawyer's duties of candor and confidentiality.¹⁵⁵ The issues raised with respect to each of these provisions are discussed below.

a. *CCBE Rule 3.8.1* and Client Funds

The first Austrian legal ethics provision which was addressed in the report was the Austrian provision dealing with the safekeeping of client funds. The Committee concluded that while certain provisions in the *CCBE Code* require more than is required by the Austrian ethics provisions, these *CCBE Code* provisions do not conflict with the Austrian provisions.¹⁵⁶ Thus, for example, *CCBE Rule 3.8.1*, which specifies how a lawyer must handle a client's funds,¹⁵⁷ is stricter than the corresponding Austrian provision.¹⁵⁸ An Austrian lawyer who complied with the additional requirements in the *CCBE Code*, therefore, would not be violating Austrian law.

b. *CCBE Rule 4.2* and Ex Parte Contacts Between Judges and Lawyers

The second Austrian legal ethics topic discussed in the report concerned issues related to a lawyer's ex parte contacts with a judge. The committee noted that if *CCBE Rule 4.2* had contained only the first part of its rule, then

Rechtsanwälter). Additional legal ethics provisions are located in the *RAO*, which is the statute regulating lawyers. See *RAO supra* 126; see also *supra* note 145. Accord PART I, *supra* note 1, at 50 n.196.

152. In an article reporting on the *CCBE Code*, Dr. Hempel concluded that there was no divergence between the Austrian provisions and the EC provisions and that incorporating EC requirements into the Austrian Richtlinien would not be problematic. Hempel II, *supra* note 116, at 211.

153. *Id.*

154. *Id.*

155. *Id.* See *CCBE CODE Rule 3.1.4; Rule 3.8.1; Rule 4.2; Rule 5.3.1; Rule 5.3.2.*

156. See Hempel II, *supra* note 116, at 211.

157. *CCBE CODE Rule 3.8.1.*

158. See RL-BA 1977, *supra* note 151, § 43; see also Hempel II, *supra* note 116, at 211 (discussing RL-BA 1977 §43).

it would have been inconsistent with the Austrian norms.¹⁵⁹ The report continued, however, by noting that the second half of Rule 4.2 added the statement that a lawyer may not contact a judge *ex parte* “unless such steps are permitted under the relevant rules of procedure.”¹⁶⁰ Thus, this committee concluded that there was no inconsistency between the Austrian approach and *CCBE Rule* 4.2,¹⁶¹ because in Austria, lawyers can have certain kinds of *ex parte* contacts with judges.¹⁶²

c. *CCBE Rule* 3.1.4 and a Lawyer’s Withdrawal from a Case

The third Austrian legal ethics issue addressed in the report was the issue of a lawyer’s withdrawal from a case. The committee concluded that the Austrian civil procedure provision was not inconsistent with *CCBE Rule* 3.1.4, which states that “[a] lawyer shall not be entitled to exercise his right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.”¹⁶³ The Austrian provision requires, among other things, that a lawyer give the client 14 days notice before terminating representation so that the client can take steps to protect its interests.¹⁶⁴

d. *CCBE Rules* 5.3.1 and 5.3.2 and the Issue of the Confidentiality of Correspondence between Lawyers

The fourth legal ethics issue raised by the report was the confidentiality of correspondence among lawyers.¹⁶⁵ As explained in the *CCBE Explanatory Memorandum’s* Commentary to *CCBE Rule* 5.3.1, “[i]n certain Member States communications between lawyers (written or by word of mouth) are normally regarded as confidential. This means that lawyers accept that those communications may not be disclosed to others and *copies may not be sent to the lawyers’ own client*.”¹⁶⁶ The *CCBE Code* has not attempted to resolve these differences but instead attempts to avoid misunderstandings by providing the ground rules under which a cross-border exchange of correspondence should be sent. According to *CCBE Rule* 5.3.1, a lawyer who wishes correspondence to remain confidential or without prejudice should clearly express that intention at the time the correspondence is

159. Hempel II, *supra* note 116, at 211.

160. *Id.* See *CCBE CODE Rule* 4.2.

161. Hempel II, *supra* note 116, at 211.

162. See PART I, *supra* note 1, at 38 n.159 and accompanying text.

163. *CCBE CODE Rule* 3.1.4. See Hempel II, *supra* note 116, at 211.

164. *RAO*, *supra* note 126, §§ 11, 12.

165. See Hempel II, *supra* note 116, at 211.

166. *CCBE EXPLANATORY MEMORANDUM*, *supra* note 1, Rule 5.3 cmt. (emphasis added).

sent.¹⁶⁷ According to *CCBE Rule 5.3.2*, a lawyer who is unable to ensure the status of such correspondence as confidential or without prejudice should return it to the sender without revealing the contents to others.¹⁶⁸

As the committee reported, in Austria a lawyer has no right to keep matters confidential from the lawyer's client.¹⁶⁹ However, the committee concluded that in view of the right to decline "confidential" correspondence, which is provided for in *CCBE Rule 5.3.2*,¹⁷⁰ there was no conflict between the Austrian ethics provisions and this provision of the *CCBE Code*.¹⁷¹

In its explanation of this issue, the report did not address the question discussed in Part I of this article as to how a lawyer practically should deal with this potential dilemma. The dilemma may occur if an Austrian lawyer must read a letter in order to learn that the sender intended it to be confidential from the recipient lawyer's client, and yet by reading the letter, then returning it and keeping this information confidential, the lawyer is in fact withholding information from the client. This issue of "putting the genie back in the bottle" is not unique to Austria; this same issue is faced by other lawyers in Member and Observer States where such a right of confidentiality between lawyers is not recognized.¹⁷² Thus, Austria's conclusion that *CCBE Rule 5.3.1* was not inconsistent with Austrian law undoubtedly is correct given the context in which the *CCBE Code* was adopted.

e. *CCBE Rule 4.4* and the Duty of Candor Owed to a Court

The most difficult issue confronted by the Austrian working group was presented by *CCBE Rule 4.4*, which states that "[a] lawyer shall never knowingly give false or misleading information to the court."¹⁷³ The *CCBE Explanatory Memorandum* explained that "[t]his provision applies the principle that the lawyer must never knowingly mislead the court. This is necessary if there is to be trust between the courts and the legal profession."¹⁷⁴ This principle — and the issue of how to apply it, especially in cases involving client perjury — has produced considerable disagreement and debate in the United States.¹⁷⁵

It may or may not be consoling to Americans to know that this issue proved to be the most problematic one faced by the Austrian working

167. *CCBE CODE Rule 5.3.1*.

168. *CCBE CODE Rule 5.3.2*.

169. See *Hempel II*, *supra* note 116, at 211.

170. *Id.*

171. *Id.*

172. See *PART I*, *supra* note 1, at 39-41 nn.161-66 and accompanying text.

173. See *Hempel II*, *supra* note 116, at 211 (citing *CCBE Rule 4.4*).

174. *CCBE EXPLANATORY MEMORANDUM*, *supra* note 1, Rule 4.4 cmt.

175. See authorities cited in *PART I*, *supra* note 1, at 28 n.99.

group. Dr. Hempel's explanation on behalf of the committee was that, in the Anglo-American trial tradition, the lawyer's duty to find the truth is at least as important, if not more important, than the lawyer's duty of loyalty to the client and therefore the lawyer may not knowingly introduce false testimony.¹⁷⁶ Thus, a lawyer who is subject to *CCBE Rule 4.4* may, in certain cases, be prohibited from introducing the false testimony to the court.¹⁷⁷

The committee did not comment further on whether this Anglo-American approach was inconsistent with the Austrian legal ethics rules or whether revision would be required in order to make Austrian law consistent with *CCBE Rule 4.4*. Instead, it merely referred the reader to the literature and cases decided pursuant to the Austrian criminal procedure rules which establish the definition and limits of false testimony in a case.¹⁷⁸ It is beyond the scope of this article to provide a review of the Austrian law regarding how a lawyer should respond when false testimony has been given and whether a lawyer may ever violate the duty of confidentiality in order to provide information to the court. However, the failure of the committee's report to delineate a clear answer to this dilemma may indicate that the issues posed by coordinating the confidentiality and candor requirements contained in *CCBE Rules 2.3* and *4.4* may prove as problematic in EC countries as they have in the United States.

As an aside, it should be noted that some of the comments in the Austrian report may seem surprising, if not counter-intuitive, to an American. Many Americans are accustomed to reading gross generalizations about the differences between the "adversary" system used in the United States and the "inquisitorial" system used in many continental European countries.¹⁷⁹ We read that in the American adversarial system, the lawyer is the client's representative or "hired gun," whereas in the "inquisitorial" systems of Europe, the lawyer takes a secondary role, often leaving to the judge the responsibility to ask questions and present the case.¹⁸⁰ One's impression from these materials could be that the American lawyer has a stronger duty of loyalty to the client than does a lawyer in the European inquisitorial system. The committee's report, however, suggests a completely reversed perspective with respect to these gross generalizations concerning the role of the American lawyer and Austrian lawyer. As expressed in the committee's

176. Hempel II, *supra* note 116, at 211.

177. *Id.*

178. *Id.*

179. For a look at the theory and structure of the adversary and inquisitorial systems, see, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50-103 (1988) [hereinafter *LAWYERS AND JUSTICE*]; THE GOOD LAWYER: *LAWYERS' ROLES AND LAWYERS' ETHICS* 83-187 (David Luban ed., 1984) [hereinafter *THE GOOD LAWYERS*]; MURRAY SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS* 15-34 (2d ed. 1985); Edward Barrett, *The Advocacy System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 480 (1962).

180. See *LAWYERS AND JUSTICE*, *supra* note 179, at 93-103.

report, it is the Austrian lawyer who is a vigorous advocate of the client's interests, bound by the duty of loyalty above all else, whereas the lawyer from the Anglo-American tradition puts the duty to find the truth at least as high, if not higher, than the duty of loyalty to a client.¹⁸¹ While both sets of gross generalizations are probably inaccurate, it is interesting to observe such diametrically opposed views of a lawyer's respective roles and obligations.

In sum, then, the Austrian committee concluded that the *CCBE Code* was not inconsistent with Austria's legal ethics provisions.

4. Additional Reform of Austria's Legal Ethics Provisions: Is it a Step Towards Harmonization with the EC Law Governing Lawyers?

As explained in the above sections, Austria's working committee found no basis for concluding that the *CCBE Code* should be rejected as inconsistent with Austria's ethics rules. The committee thus found no need to reform the existing Austrian provisions. This finding that the Austrian ethics code is consistent with the *CCBE Code* may suggest a status quo within the Austrian legal profession that is inaccurate. In the past few years generally, and in the last year particularly, there have been a number of significant changes to the Austrian legal ethics provisions, and there is talk within the bar of changes that could significantly change the nature of law practice in Austria.¹⁸²

One of the recent changes to Austria's legal ethics rules that may prove to be most significant is the decision to permit foreign lawyers to become established or provide services in Austria. In late 1992, the Austrian legislature adopted additional laws governing the situation of these foreign lawyers.¹⁸³

These reforms had been the topic of much discussion by the Austrian bar. Since 1987, Austria has had a "working group" responsible for looking at the effect of European integration on the Austrian legal profession, so that the bar could respond promptly if and when integration occurs.¹⁸⁴ For example, there has been significant discussion and debate as to whether

181. See Hempel II, *supra* note 116, at 211. Cf. Geoffrey C. Hazard, Jr., *Ethics*, NAT'L L.J., Mar. 30, 1992, at 13. In noting differences between the *Model Rules* and *CCBE Code*, Professor Hazard stated that "[t]he *CCBE Code* puts the lawyer's duty to the courts and public on a par with the duty to the client, rather than giving strong prominence to the latter" and also states that "[a] higher duty of candor to the court is imposed" by the *CCBE Code*. *Id.* This interpretation certainly puts a completely different perspective on a lawyer's obligations under the *CCBE Code* than Dr. Hempel's article.

182. See *infra* notes 183-194 and accompanying text.

183. EWR-RECHTSANWALTSGESETZES 1992 (*EWR-RAG* 1992), BGBl 1993/21 (Jan. 14, 1993). This law takes effect when Austria's entry to the European Economic Area becomes effective.

184. See Hempel I, *supra* note 37, at 489. This group was formed after an influential speech that

Austria should use a test or an adaptation period as a way of ensuring the qualifications of foreign lawyers who want to "establish" themselves in Austria.¹⁸⁵ Austria opted to use a test.¹⁸⁶ After discussion of the appropriate language for such a test, German was chosen.¹⁸⁷ There was also discussion about whether an established foreign lawyer should be subject to the same rights and duties as an Austrian lawyer, including the mandatory duty to provide legal services, and whether this lawyer should be subject to discipline in Austria for failure to comply with these duties.¹⁸⁸

In addition to the changes necessary in order to permit foreign lawyers to practice in Austria, there have been a number of recent changes and calls for change to the domestic legal ethics provisions. The result of these changes may be a greater harmonization between Austria's legal ethics rules and those of other European countries. There is evidence that this is occurring already. For example, Austria recently relaxed significantly its ban against employed lawyers, now permitting lawyers to be employed by other lawyers.¹⁸⁹ Austria also may be moving in the direction of harmonization in the area of lawyer advertising. A firm recently challenged Austria's strict legal advertising rules, and the case is pending before the Austrian supreme court.¹⁹⁰ A recent report suggests, however, that the restrictive advertising rules may be relaxed by the bar even before the court decision is rendered.¹⁹¹ Another example of movement towards harmonization involves fees. There have been suggestions to revise the ethical guidelines

was given at the October 8, 1987, annual meeting of ÖRAK by Louis Schiltz. This speech reportedly prompted the formation of the working group. *Id.*

185. See Frieders II, *supra* note 73, at 177. See also *supra* note 73 and accompanying text (discussing the right of establishment and a Member and Observer State's option to select either a test or an adaptation period as a means of confirming the qualifications of the migrant lawyer).

186. EWR-RAG 1992, *supra* note 183. See Frieders I, *supra* note 70, at 299.

187. EWR-RAG 1992, *supra* note 183. Frieders I, *supra* note 70, at 299. See also Hempel I, *supra* note 37, at 495 (specifying German as the test language); *Berichte IV*, *supra* note 122, at 33, 35 (opting for a test, to be given in German, rather than an adaptation period); Lonbay II, *supra* note 37, at 6. Lonbay states:

The text of the directive is silent as to language requirements. Naturally commercial commonsense means that a migrant who seeks to cross-qualify and practice in the new profession should be able to communicate with his future clients. A Declaration of the Council and Commission makes it clear that knowledge of a national language is necessary. The tests (that are likely to be required by all the legal professions except the Danish advokats) will be in a national language.

Id.

188. See Frieders II, *supra* note 73, at 181-82. See also RAO, *supra* note 126, § 45 (setting forth a lawyer's duty to provide legal assistance).

189. See Amtliche Mitteilungen, *Kundmachung des Österreichischen Rechtsanwaltskammertages*, 1993 ANW.BL. 150 (publishing change to RL-BA 1977, § 5).

190. See *Update: Austria Poised to Loosen Advertising Restrictions*, LAWS. EUR., July 1993, at 9.

191. *Id.*

regulating the type and amount of fees Austrian lawyers may charge.¹⁹² Recent commentaries have also questioned how long the prohibition against branch offices can stand.¹⁹³ Lastly, questions are being raised about the training and testing of lawyer-apprentices.¹⁹⁴

Whether expressly acknowledged or not, much of the momentum for these changes seems to be coming from the ongoing EC integration and an effort to ensure that Austrian lawyers are not competitively disadvantaged.¹⁹⁵ For example, the theme of the November 1991 ÖRAK meeting was "Lawyer 2000 — the Modern Lawyer — Tradition in Flux."¹⁹⁶ Of the reports published after this meeting, four of the six working circles referred in some way to the effect of EC law or the *CCBE Code* on the practice of law in Austria.¹⁹⁷ In fact, these working groups appear to be quite influential since a number of the changes they recommended have since been adopted.¹⁹⁸ Furthermore, in talking about the development of the legal

192. See Kurt Dellisch, *Reform des Rechtsanwaltsstarifes*, "warum einfach, wenn es bisher, kompliziert gegangen ist" 1992 ANW.BL. 872 (discussing the difficult issues involved in the debate about reforming attorneys' fees); Rudolf Zitta, *Anmerkungen zur Standesrechtlichen Honorar-Richtlinie (§§ 5 — 55 RL-BA 1977)* 1993 ANW.BL. 226 (outlining the questions that need to be posed and answered before fee-reform may come about).

193. See *Rechtsprechung: Disziplinarrecht 4420*, *Anmerkung* 1993 ANW.BL. 259 (questioning whether branch offices should continue to be deemed impermissible); Frieders I, *supra* note 65, at 301-02 (questioning the very purpose of the prohibition against branch offices); Heinz Mayer, *Anwaltliches Filialverbot und überörtliche sozietät*, 1992 ANW.BL. 705 (noting that it might only be a matter of time before such prohibitions are invalidated, particularly in view of the fact that foreign branch offices have been quietly established).

194. See, e.g., Karl Newole, *Zur Praxiszeit für Konzipiente*, 1992 ANW.BL. 11; Rudolf Zitta, *Zur Verkürzung der RAA-Praxis*, 1992 ANW.BL. 785.

195. See, e.g., *Berichte IV*, *supra* note 122, at 36 (reporting on the Lawyers 2000 meeting); Frieders I, *supra* note 70, at 301 (predicting that the adoption of an establishment directive, effective in Austria, will greatly affect the legal profession).

One working group concluded that the training period should be reduced from 7 years in order to be more in line with the training period used elsewhere in the EC. *Id.* at 37. With respect to the filial office ban, one working group at the "Lawyers 2000" meeting said that the branch office ban must be deleted in order to avoid discrimination against domestic lawyers in comparison with established foreign lawyers. *Id.* at 36. Cf. Case 107/83, *Ordre des Avocats du Barreau de Paris v. Klopp*, 1984 E.C.R. 2971, 1 C.M.L.R. 99 (1985) (holding that the Paris bar could not refuse admission to a German lawyer on the grounds that he intended to have offices in both Germany and Paris in violation of the Paris bar's one office rule). As Hamish Adamson noted, *Klopp's*

indirect effect was to deal a death blow to internal rules of "unicité de cabinet" which existed not only in France, but in other Member States. It was clearly anomalous that a French lawyer, for example, could not have offices in Paris and Lyon, but could have offices in Paris and Brussels. . . .

ADAMSON, *supra* note 37, at 29. Accord Goebel, *supra* note 37, at 591 ("Doubtless the impact of *Klopp* influenced France and Germany to enable law firms to have branch offices in other regions in their respective recent laws revising the rules governing the legal profession.").

196. See *Berichte IV*, *supra* note 122, at 34.

197. *Id.* at 35-36.

198. This group made recommendations with respect to four different sources of law: 1) the statute regulating lawyers; 2) the administrative provisions which are equivalent to a legal ethics

profession and future trends, there are increasing references to the internationalization of the legal market and the pressure to permit new organizational forms for law firms.¹⁹⁹ The issues that have been recently discussed include the American-style large law firm, a "multiple-disciplinary" partnership, and multinational partnerships.²⁰⁰ In addition, the Austrian bar has noted that these issues arise in the context of the increased specialization and competition from nonlegal professionals.²⁰¹

Whether some or all of these rules will ultimately be changed is a question beyond the scope of this article. Regardless of whether all these changes occur, however, one conclusion seems undeniable. The awareness of foreign lawyers and the desire to be a part of, and compete in, a European Community of lawyers, will create growing pressure to continue the effort to harmonize the Austrian law regulating lawyers with the law in other European countries. Thus, Austria's adoption of the *CCBE Code* may just be the first step on the road to that harmonization.

In sum, then, Austria provides an instructive case study of the effect of *CCBE Code* on a CCBE state. Austria's efforts to educate its lawyers, to adopt the *CCBE Code*, and to consider the *CCBE Code* when reforming its

code; 3) the provisions which must be adopted to implement integration into the European Community; and 4) the provisions which establish the form in which a law office may operate. *Id.* at 34-35. With respect to this first source of law, namely the Austrian statute governing lawyers (*RAO*), this group had two general recommendations and one specific change. First, the group began by recommending that the fundamental provisions setting forth the obligations of lawyers remain unchanged. *Id.* at 34 (echoing the requirements found in *RAO* §§ 8-10, 20. *See also supra* note 126. The working group also suggested that there be better ways to deal with the untrustworthy lawyer. *Berichte IV, supra* note 122, at 35. It was recommended that the bar committee speak against such incursions into the duty of confidentiality and take efforts to see that suitable legal protections are in place. *Id.* The group also recommended a concrete change to the *RAO* or lawyer's statute. They recommended that the training period for lawyers be reduced to five years. *Id.* at 34. This has since been accomplished. *See BGBl* 1992/176 (March 31, 1992) (changing the *RAO*).

With respect to the legal ethics code governing Austrian lawyers — the *Richtlinien* or *RL-BA* 1977 — the working group recommended two primary changes. First, the group recommended that the ethics code be amended to permit an Austrian lawyer to have a branch office. *See Berichte IV, supra* note 122, at 35. The second change recommended was a change in *Richtlinien RL-BA*, § 5 which forbade, among other things, a lawyer from working as an employee, thus excluding house counsel from the circle of lawyers. *Id.* The group also recommended that lawyers be permitted to establish corporations as a means of limiting their liability. *Id.*

199. *Berichte IV, supra* note 122, at 36.

200. *See, e.g.*, 1991 ANW.BL. app. at IV-V; *Berichte I, supra* note 70, at 419, 420 (plenary session of CCBE discussing multi-disciplinary partnerships); *Berichte III, supra* note 117, at 251 (describing the Vienna meeting of the CCBE, which was reported in *Österreichisches Anwaltsblatt* and which included discussions of multidisciplinary partnerships, multinational partnerships, and the future role of Eastern European countries); Karl Hempel, *Formen der Zusammenarbeit zwischen Rechtsanwältinnen im Neuen Europa*, 1991 ANW.BL. 221, 222-23 (1991) [hereinafter Hempel III]; Newole, *supra* note 194, at 11.

201. *See Hempel I, supra* note 37, at 495 (noting that the real challenge to Austrian lawyers comes not from foreign lawyers, but from other professionals).

laws all illustrate the difficult issues that arise in implementing a multi-national code of conduct.

III. CONCLUSION

It is truly an exciting time for lawyers in the world as the nature of legal practice, the ethical rules governing such legal practice, and even the source of those ethical rules change dramatically. Fifty years from now, lawyers worldwide could conceivably operate in accordance with the GATT agreement and may all share a common code of legal ethics. What this section of the article has addressed are the difficult issues that must be addressed as groups of countries attempt to move towards use of a single ethics code. As the *CCBE Code* demonstrates, the issue of determining "in which situations the *CCBE Code* applies" is a difficult one and may take time to work out. And disciplinary enforcement and judicial recognition may come about slowly. One thing is certain, however: the dialogue and analyses that occur when lawyers from different cultures talk about legal ethics codes can only help further our understanding of and sensibility to these issues and our own values regarding legal ethics.